2007

Trugreen Companies, L.L.C. v. Mower Brothers, Inc., Kevin Bitton, Scotts Lawn Service, Greenside, L.L.C., Jean Robert Babilis, Ryan Mantz, Jason Hiller, Lary Gaythwaite, Matt Walker, Jim Leblanc, James Clogston, Rick Deerfield, David Stephensen, David Van Acker, Isaiah Plumley, Shannon Christensen, Paul Brower, James Murray, Richard Coffman, Tammy Roehr, Jessica Spencer, Margie Smith, Aflreda Egbert, Jason Beck : Brief of Petitioner

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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IN THE SUPREME COURT OF THE STATE OF UTAH

TRUGREEN COMPANIES, L.L.C., a Delaware limited liability company, and TruGreen Limited Partnership, a Delaware limited partnership, Petitioners, vs. MOWER BROTHERS, INC., a Utah corporation, KEVIN D. BITTON d/b/a SCOTTS LAWN SERVICE, a Utah entity, GREENSIDE, L.L.C., a Utah limited liability company, KEVIN D. BITTON, an individual, JEAN ROBERT BABILIS, an individual, RYAN MANTZ, an individual, JASON HILLER, an individual, LARY GAYTHWAITE, an individual, MATT WALKER, an individual, JIM LEBLANC, an individual, JAMES CLOGSTON, an individual, RICK DEERFIELD, an individual, DAVID STEPHENSEN, an individual, DAVID VAN ACKER, an individual, ISAIAH PLUMLEY, an individual, SHANNON CHRISTENSEN, an individual, PAUL BROWER, an individual, JAMES MURRAY, an individual, RICHARD COFFMAN, an individual, TAMMY ROEHR, an individual, JESSICA SPENCER, an individual, MARGIE SMITH, an individual, ALFREDA EGBERT, an individual, JASON BECK, an individual, Respondents.	Case No. 20070451-SC FILED UTAH APPELLATE COURTS JAN 2 3 2008

RESPONSIVE BRIEF OF PETITIONERS

On Certification of Question of State Law by the United States District Court,
in and for the District of Utah, Honorable Paul G. Cassell
1:06-cv-24 PGC

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RESPONSE TO RESPONDENTS' "STATEMENT OF FACTS"

When a federal court certifies questions of state law pursuant to Utah Rule of Appellate Procedure 41, the role of this Court is to "answer the legal questions presented without resolving the underlying dispute." *In re Kunz*, 99 P.3d 793, 794 (Utah 2004); *Spackman ex rel. Spackman v. Bd. of Educ.*, 16 P.3d 533, 534 n. 2 (Utah 2000) ("We will not seek to resolve the underlying dispute.").

In apparent effort to subvert this standard, Respondents present several "statements of fact" which do not represent findings of the District Court[1] but are based upon the self-serving summary judgment memoranda and supporting affidavits of Respondents. *Brief of Respondents* at 9-12 (citing almost exclusively[2] from "R.184," *Memorandum in Support of Motion For Summary Judgment of Defendants Mower Brothers, Inc., Scotts Lawn Service, Greenside, L.L.C., Kevin D. Bitton and Jean Robert Babilis*). While this may be considered accordance with TruGreen's opening statement that there are relatively few written findings of liability within the record,[3] Respondents' recitation of these "facts" without clarification that many are disputed is improper and unfairly presents important factual issues in a light most favorable to Respondents. Notably, the District Court did not just deny TruGreen's summary judgment motion, but also denied several parts of Respondents' collective motions as well. *Feb. 13 Summary Judgment Order* (D. 253) at 34 and 44.

Accordingly, TruGreen preliminarily responds with the following limited clarifications (though several others could also be made), cognizant of the Court's mandate that it is not here to resolve the parties' factual disputes:

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[1] For convenience, identifying terms described in TruGreen's Opening Brief are referenced throughout this brief.
[2] Also citing once from "R.193," *Memorandum in Support of Ryan Mantz's Motion For Summary Judgment*.
[3] *Opening Brief of Petitioners* at 6.

o The suggestion that this certification is the result of some reactionary measure to resuscitate TruGreen's damage claim is strikingly incorrect. TruGreen has never argued unjust enrichment "as an alternative to its failed attempt to prove any lost profits." *Brief of Respondents* at 6. Rather, as addressed to the District Court during the February 28, 2007 hearing, the argument in favor of recovering Respondents' ill-gotten gains have been, from the beginning, the essence of TruGreen's claim for damages. *Motion Hearing Transcript* (Add. No. 2) at 42:25-43:14, 45:1-8, 56:17-61:4; *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at 30-33 (citing many of the same authorities argued in TruGreen's Opening Brief, including *Natl. Merchandising Corp. v. Leyden*, 348 N.E.2d 771 (Mass. 1976)). This verity is reflected in the excluded expert report of Wayne Elggren[4] as well as the District Court's expressed uncertainty regarding dismissal of TruGreen's claims on a lost profits theory:

> THE COURT: Here is – I think you may – you know, maybe – I have got a legal question and you're making a factual argument. Let me give you this as a way of crystallizing it. So Mr. Johnson calls as his first witness at trial Stephensen, let's say. So how much did you sell last year for [Scotts[5]]? I sold 280,000 or maybe it is less, you know, but it is some amount. And then he says, okay, judge, that is our damage figure 280,000. We want restitution. Is he legally entitled to take Stephensen's sales or maybe you would have to make it profits, let's say the profit margin on that is whatever so say it is 50,000 in profits. Is he entitled to get that legally back to [TruGreen] as a restitution for competing when he shouldn't have?
>
> MR. GIBB [counsel for Respondents]: I think the court has answered that in its prior order [*Feb. 13 Summary Judgment Order*] very expressly no. . . . The Court knows and has previously ruled, correctly we believe, that the appropriate measure of damage must consider these other factors. . . .
>
> THE COURT: I mean I'm still – let me just bring you back because this is where I'm getting hung up here. I thought I was ruling on sort of a lost profit damage calculation expert saying, you know, these folks were competing and it hurt these

[4] *TruGreen Calculation of Claims* (D. 169) at 6 (basing calculation of Scotts' revenue gains on terms within the employee-Respondents' respective Non-Compete Agreements and the assumption "that courts have considered the gain achieved by defendants as a result of defendants' actions as an appropriate basis to determine the amount" of TruGreen's damages).

[5] The District Court mistakenly exchanged references to TruGreen and Scotts in this portion of the transcript.

> folks by X amount and I'm saying wait a minute, to do that you have got to take into account all these other factors.
>
> MR. GIBB: I agree.
>
> THE COURT: But if they said okay, we're going to simplify it much more. You made a dollar, you made 280,000 in sales, we should get that as restitution. I mean where is – does the law allow you to do that?

Motion Hearing Transcript (D. 271) (Add. No. 2) at 49:4-51:6.

> So the way I see things, the question boils down to whether the Utah Supreme Court would follow the lead of the Supreme Judicial Court of Massachusetts in cases like *National Merchandising Corporation* [*supra*] in recognizing that theory. And as I read through the cases, I don't see anything that really gives me much of a feeling for what the Utah courts would do with this. I don't see – I see the rescission case that is *Polyglycol* being a rescission case which I think is distinguishable. *Robbins v. Finlay* and the liquidated damages case that doesn't seem to speak to that. And *Sampson*,[6] while talking about loss to the plaintiff, doesn't seem to foreclose this other theory. If it were up to me, if I were the one that got to write the law, I would say the Massachusetts court has it right. That restitution ought to be a reasonable measure of damages. But this isn't a question for me to decide. It is a question of what Utah law would be and what the Utah courts would recognize. If I were to rule this second, my thought is that I would certify to the Utah Supreme Court the question of whether it would follow the lead of the Massachusetts Supreme Court on this theory.

Id. at 62:21-63:16.

- The averment that "Mower Brothers did not ask, direct or encourage any former TruGreen employees to induce or encourage other TruGreen employees to terminate their employment or go to work for Mower Brothers" and otherwise did not intend "to harm TruGreen's business" is based solely on the self-serving affidavit testimony of Respondents Bitton and Babilis and plainly are disputed "facts" of this case. *Brief of Respondents* at 9-10.[7] TruGreen's claims for tortious interference have never been dismissed by the District Court and are aptly supported in the summary judgment record. *Memorandum in Support of Plaintiffs'*

[6] Authority also relied upon by Respondents in this certification. *Brief of Respondents* at 29.

[7] *Memorandum in Support of Motion For Summary Judgment of Defendants Mower Brothers, Inc., Scotts Lawn Service, Greenside, L.L.C., Kevin D. Bitton and Jean Robert Babilis* (D. 184) at xxiv (recitation of affidavit testimony of Bitton and Babilis).

Motion For Summary Judgment (D. 178) at xvi-xxii, ¶¶ 44-57 (testimony from former Mower Bros.' employees regarding Babilis' malevolent efforts to acquire TruGreen management and veteran sales personnel), and Exhibit B1 (written offer of indemnification to Mantz).

Likewise, the solicitous efforts of Respondents Mantz and Gaythwaite to recruit LeBlanc and Stephensen in behalf of Mower Bros. and in breach of their Non-Compete Agreements are preserved in the summary judgment record. *Id.* at xxix-xxx, xxxix, xliii-xlv, ¶¶ 85-88, 135-38, 156-68 (testimony of LeBlanc and Stephensen regarding their recruitment to Mower Bros.).

- The District Court has never ruled that information received and purloined by Respondents "is not confidential or a trade secret." *Brief of Respondents* at 11. Like the tortious interference claims addressed above, these breach-of-contract claims are the very subject of this certification and supported in the summary judgment record. *Feb. 13 Summary Judgment Order* (D. 253) at 34; *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at viii-xiv, xxviii-xxix ¶¶ 3-33, 81-84 (description of specialized training and Respondents' purloining of the same), and Exhibits B1-5 (coterminous description in Scotts Non-Compete Agreements that "Confidential Business Information include[es] information relating to research, products, training, management, marketing and selling.").

- Respondents evasively suggest that former TruGreen employees named in this litigation, including those pertinent to this certification, all served in lower level positions at TruGreen prior to their employment with Mower Bros. *Brief of Respondents* at 2 ("These individuals had served in such positions for TruGreen as customer service representative, auditor, sales representative, or service manager."). In fact, these employees served as branch managers, branch marketing managers, and veteran sales representatives in the months and years immediately preceding their employment with Mower Bros. *Feb. 13 Summary Judgment Order* (D. 253) at 5, 9-12; *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D.

178) at xxiii-lv.

o Following the District Court's February 13, 2007 Order, more than "a few contract claims against a few former employee defendants" remained pending. *Brief of Respondents* at 3. Most contract and tort claims against the respective Utah and Idaho Respondents were left substantially intact from TruGreen's complaint and initial request for preliminary injunction. *Opening Brief of Petitioners* at 3-4 (listing the respective claims pending against Respondents); *Feb. 13 Summary Judgment Order* at 34.

o The reality remains that the District Court never disagreed with the basic facts as first articulated in TruGreen's initial complaint for injunctive relief: (1) the individual defendants signed unambiguous covenants not to compete in favor of TruGeen; (2) the individual defendants were targeted and recruited by Mower Brothers; (3) the individual defendants left TruGreen and went to work for Mower Brothers in violation of their covenants not to compete; (4) Mower Brother's sales thereafter went up; and (5) TruGreen's sales thereafter went down.

ARGUMENT

I. Restitution or unjust enrichment is an appropriate measure of damages in this case for Respondents' tortious interference.

A. Utah law does not "confirm" Respondents' blanket proposition that lost profits damages are the exclusive remedy for a tortious interference claim.

Contrary to Respondents' opening arguments and as set forth in TruGreen's Opening Brief, decisions by this Court and the Utah Court of Appeals which recognize and apply *Restatement (Second) of Torts* § 774A (1979) do not remotely suggest, let alone "confirm," that damages in a tortious interference case are exclusively confined to lost profits. *Brief of Respondents* at 26. This is a misstatement of the law. Indeed, the District Court so indicated when it certified Question No. 2 to this Court:

> And as I read through the cases, I don't see anything that really gives me much of a feeling for what the Utah courts would do with this. . . . *Sampson* [770 P.2d 998

> (Utah App. 1989)] while talking about the loss to the plaintiff doesn't seem foreclose this other theory [of a measure of Respondents' gains].

Motion Hearing Transcript (D. 271) (Add. No. 2) at 62:25-63:7. None of the Utah cases relied upon by Respondents concern the competing interests of an interfering tortfeasor, nor involve circumstances in which gains of the defendants were even in issue.

In *Penelko, Inc. v. John Price Assoc., Inc.*, the plaintiff lessee charged that lease violations and wrongful interference with its business by the defendant assignee had caused it lost profits damages "in the form of substantial reduction in patronage and revenue." 642 P.2d 1229, 1233 (Utah 1982). The plaintiff did not seek, nor did the Court contemplate, gains of the defendant as a potential remedy. *Id.* at 1233-34. In *Globe Leasing Corp. v. Bank of Salt Lake*, the plaintiff leasing corporation brought suit against the defendant bank for tortious interference and sought recovery of lost profits, claiming "that as a result of the termination of a the financing arrangement" it had with the defendant, "it could not obtain funds from other sources." 586 P.2d 420, 422 (Utah 1978). Again, the Court was not asked, nor did it examine, any purported gains of the defendant in assessing damages. *Id.* And in *Anderson Dev. Co. v. Tobias*, the plaintiff land developer sued individual defendants for their interference with a real estate purchase contract and the increased costs the plaintiff suffered as a result of having to renegotiate a second contract. 116 P.3d 323, 329 (Utah 2005). In "limiting" these consequential damages of the plaintiff "to those incurred as a direct result of" the alleged interference, *id.* at 334,[8] the Court was not concerned with any pecuniary gains achieved by the defendant, which in fact were none. *Id.* at 328 (describing the defendants' motive for interference as furtherance of a "Save our South Jordan River Valley" campaign).

Likewise, those courts identified by Respondents as "interpreting" Utah law merely

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[8] "The damages ADC may recover <u>under this claim</u> are limited to those it incurred as a direct result of Tobias and Feld's alleged misrepresentations to the Williamses regarding the existence of a *written* offer to purchase the property." (Emphasis added).

restate *Sampson's* recitation of Section 774A and do not concern a recovery of the defendant's gains. *Bosshard v. Wagstaff*, Case Nos. 90-4062, 90-4068, 1991 U.S. App. LEXIS 16112, *5 (10th Cir. July 16, 1991); *U.S. v. Bald Eagle Realty*, 21 F. Supp. 2d 1332, 1334 (D. Utah 1998) ("Plaintiffs seek to recover the profits they would have earned . . . under theories of fraud [and] tortious interference with economic relations"). In *Sampson v. Richins*, the defendant tortfeasor appealed the trial court's award of consequential and restorative damages for his unlawful interference in assuming control over the plaintiffs' partnership interests. 770 P.2d 998, 1006 (Utah App. 1989). In assessing these damages under Section 774A, the Court of Appeals determined that the defendant deprived the plaintiffs "of the use and control of approximately $290,000," but gave no discussion as to gains achieved by the defendant or whether one could recover damages based on the defendant's profits. *Id.* at 1006-07.

Accordingly, these cases do not stand for Respondents' blanket proposition that Utah law recognizes lost profits damages to the exclusion of any other remedy in a tortious interference claim. *See Sandare Chem. Co. v. Wako Intl., Inc.*, 820 S.W.2d 21, 24-25 (Tex. App. 1991) (rejecting defendants' argument that Section 774A and prior rulings on lost profits damages excluded recovery of the defendant's gains). As authorities from other jurisdictions ruling on analogous circumstances indicate, notwithstanding a state's adherence to *Restatement (Second) of Torts* § 774A and other general tort rules, a recovery of the defendant's gains is a proper remedy:

> [T]here is authority both in the case law and scholarly commentary for the direct proposition that an unjust enrichment measure is appropriate for willful interference with contractual relations. Need and reason combine to support this avenue of recovery, because it will often be difficult to satisfy strictly a conventional tort formula . . .

Natl. Merchandising, 348 N.E.2d at 775-76; *Storage Tech. Corp. v. Cisco Sys., Inc.*, 395 F.3d 921, 925-26 (8th Cir. 2005).

B. Respondents should not be heard to say that an unjust enrichment measure of damages is unfairly punitive or does not precisely mirror TruGreen's actual loss.

Chief to Respondents' argument is its assertion that a rigid lost profits measure of damages for tortious interference is consistent with general tort theory in that a plaintiff must show causation and actual injury. *Brief of Respondents'* at 27. On this basis, Respondents argue that "[a]warding unjust enrichment or restitution for tortious acts would not be based on actual injury sustained by the plaintiff as an actual and proximate result of the defendant's tortious act." *Id.* at 27-28. Exposed, Respondents present a variant of the protest unsuccessfully utilized and directly addressed in *Natl. Merchandising* "that the unjust enrichment remedy [for willful interference with contractual relations] is unfairly 'punitive' because the plaintiff may recover more than his actual loss . . ." 348 N.E.2d at 776.

Any requirement, however, limiting a plaintiff like TruGreen to recover precisely only gains of a tortfeasor that it can show it would have attained absent their interference is inappropriate in certain circumstances. *Id.* at 775 n. 10; *see also Restatement (Second) of Torts* § 774A, comment c ("the court may, in determining whether the proof meets the requirement of reasonable certainty, give due weight to the fact that the question was 'made hypothetical by the very wrong' of the defendant"). In these cases, such as when potentially confounding factors affect the ready determination of lost profits, *Sandare*, 820 S.W.2d at 23-24, or other compensable losses may not adequately be recaptured, *Natl. Merchandising*, 348 N.E.2d at 775 n. 10, gains of the interfering defendant may appropriately be recovered as an alternative remedy. Obviously, to conclude otherwise is to encourage by judicial imprimatur the perpetration of tortious misconduct.

Here, as with the case of *Sandare*, 820 S.W.2d at 23-24, several factors affect the ready determination of TruGreen's lost profits, from the effect of its Ogden branch consolidation to the impact of advertising, weather, regional economics, population growth and any other myriad of causes inherent in—though not unique to[9]—TruGreen's business. *Feb. 13 Summary Judgment Order* at 39-40 (District Court's rejection of TruGreen's expert report on the basis of lost profits[10]); *Motion Hearing Transcript* (D. 271) (Add. No. 2) at 50:21-51:1 ("I thought I was ruling on sort of a lost profit damage calculation expert saying, you know, these folks were competing and it hurt these folks by X amount"). This does not mean that TruGreen has suffered no real damage or incurred no actual loss as Respondents continue to falsely imply. *Brief of Respondents* at 6 (commenting on TruGreen's purported "failed attempt to prove any lost profits"). To the contrary, and as an explicit backdrop to this Certification,

> [T]he [District Court] believes that **TruGreen has proven the fact of damages** but that questions remain as to the amount of damages.

Order Addressing Certification (D. 275) at 2 (emphasis added).

Furthermore, given the nature of the interference, including disclosure of confidential information and solicitation of management employees, it would be inappropriate in these circumstances to require precise proof that revenues generated by Respondents would have in fact been made by TruGreen. Mower Bros./Scotts demonstrated ability to skip the learning curve through a purloining of key management and sales personnel certainly may be considered, to a significant degree, a compensable loss in of itself. *Natl. Merchandising*, 348 N.E.2d at 775 n. 10; *Opening Brief of Petitioners* at 33-34.

Accordingly, in this case, Respondents should not "be heard to say that the unjust enrichment measure is unfairly 'punitive' because [TruGreen] may recover more than [its] exact

[9] Exhibits B to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) (Non-Compete Agreements of employee-Respondents executed in favor Mower Bros./Scotts: "In the event of breach or threatened breach by me of any provision of the Agreement, the damages which SLS [Scotts Lawn Service] might suffer would be difficult or impossible to measure").

[10] Again, a measure of damages not requested by TruGreen. *Motion Hearing Transcript* (D. 271) (Add. No. 2) at 43:8-14; *TruGreen Calculation of Claims* (D. 169) at 6.

loss . . ." *Natl. Merchandising*, 348 N.E.2d at 776. TruGreen has no adequate remedy at law in the form of lost profits damages and can establish – in fact, has established – that the significant sales growth realized by newcomer Mower Bros. in the immediate months after the mass departure of TruGreen's employees resulted from Respondents' tortious interference. *Contrast Holmes Products Corp. v. Dana Lighting, Inc.*, 958 F. Supp. 27, 36 (D. Mass. 1997) (finding the plaintiff unable to establish that the defendant's gains on sales in the market "(something which [*the defendant*[11]] had done successfully for ten years before [*the plaintiff*] entered the market) resulted from the interference"). Indeed, rather than attribute Mower Bros.' marked 2006 gains to its own unsuccessful marketing methods (including, most significantly, direct mail advertising[12]), Respondent Mantz congratulates an "immensely" improved sales team and sales managers—all former TruGreen employees—who know how to "maximize every lead" and increase sales revenues notwithstanding Scotts' marketing methods. Exhibit J to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) (Reply Add. No. 3); *see also Memorandum Opposing TruGreen's Motion For Summary Judgment* (D. 201) at Defendants' Response to TruGreen's SOF #50, #51 and #54 (offering no objection to Mantz's email and content, only that it was not "improper conduct"). If there is any question in this respect, his email leaves no doubt:

> **Based on reports from last year and this year's manual tracking of Inquiries we have substantially less Direct Mail Responses.**
> - Reports show we have received 3,783 less Inquiries year over year!
> - Last year we show we received 7,097 pieces to date Vs. 3,314 this year.
> - <u>This is a 53% Drop in Mail Response.</u>

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[11] Here, the roles are exactly the opposite, with Mower Bros./Scotts (defendant) the newcomer to the market and TruGreen (plaintiff) the successful veteran. *Opening Brief of Petitioners* at 6-7, ¶¶ 1 and 7. Moreover, as discussed, TruGreen can establish that Respondents directly benefited from their interference.

[12] *See Memorandum in Support of Motion For Summary Judgment of Defendants Mower Brothers, Inc., Scotts Lawn Service, Greenside, L.L.C., Kevin D. Bitton and Jean Robert Babilis* (D. 184) at v-vi, ¶¶ 5-7 (emphasizing that Mower Bros.' marketing methods are primarily based on "direct mail advertising that it purchases from Scotts Corporate").

- This has the potential to be devastating to our business. . . .

Sales Growth has occurred despite the dramatic drop in Mail Response.

- **As a region we have increased sales revenue 46% over last year.**
- Last year we had sold $617,000
- This year we have sold $899,950
- While Inquiries dropped 53% – sales rose 46% – This is a 99% swing in improvement!
  - Our sales team has improved immensely over last year. We could be going backwards as a business or simply staying flat with 3,700 less Inquiries.
  - Take time to pat our Sales Managers on the back. They are really saving our bacon by teaching these guys how to ***maximize every lead***. . . .

IN SUMMARY:
While we should be very concerned about our current mail numbers, we are dominating last year's results. If we sold this years low Inquiries at last year's efficiencies, we would have sold only $288,000. Instead of dwelling on crappy response rates, we are getting it done as a team.

I want to make sure everyone is aware of the success we are having and warn us against just talking about our dire response rates compared to last year. ***Thank our reps and sales managers*** for not turning in a $228,000 and getting us to the near $900,000 mark through February!

Id. (emphasis added). This is the essence of TruGreen's damage claim, Respondents' unfair benefit, and the very reason why Babilis recruited former TruGreen employees in spite of their Non-Compete Agreements.

Consistent with TruGreen's Opening Brief, therefore, where lost profits damages are not readily ascertainable and TruGreen can establish causation and the fact of damages, restitution should be available to TruGreen against the interfering Respondents. *Opening Brief of Petitioners* at 34-38.

C. The case of *Natl. Merchandising* specifically presents facts that are analogous to the facts of this case.

As summarized in TruGreen's Opening Brief, other jurisdictions accept restitution or unjust enrichment damages in certain circumstances as Respondents aver. *Id.* at 27-32. Like the Utah authorities addressed above, many of the cases relied upon by Respondents to prove the contrary are inapposite. They are limited in their opinion to strictly an analysis of lost profits where unjust enrichment was not claimed by the plaintiff[13] or where the gains of the defendant were not even in issue. *Id.* at 27 n. 18-20. Furthermore, those cases which do address the issue of unjust enrichment present facts distinguishable from circumstances here and rely on principles of contract at odds with the mass torts committed by Respondents. *Id.* at 28-32.

A case much more salient to this one (of which the District Court has already expressed its approval[14]) is the Massachusetts opinion of *Natl. Merchandising*. As stated in TruGreen's Opening Brief, this case specifically confronts the issue of unjust enrichment damages as it applies to massive breaches of employee non-competition agreements at the behest of a competing employer. *Id.* at 19-21. A close analysis of the parties' briefs in that case reveals a profusion of facts remarkably similar to those here. *Natl. Merchandising Plaintiff and Defendants Briefs* (Reply Add. No. 1 and 2).

In that case, Stevens, a former manager and supervisor of NAMCO's telephone directory cover business, was employed by CSI and its founder Schrom in violation of a consent decree which prohibited Stevens "from planning, supervising or managing . . . [the] solicitations or sales" of a competitor. *Plaintiff's Brief* at 6 and 8. Schrom was admittedly aware that Stevens had agreed not to compete with NAMCO, but nonetheless employed him as a manager over CSI's telephone directory cover business with terms of compensation that included commissions on sales made by all salesman hired after Stevens started work for CSI. *Id.* at 8. Thereafter, a number of other former NAMCO sales representatives were also hired by CSI under the supervision of Stevens. *Id.* at 10-12.

Following the trial court's finding that Stevens breached the agreement, with the

[13] Respondents' quotation from *UZ Engineered Prods. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068 (Ohio App. 2001), for example, is not the holding of that case.
[14] *Motion Hearing Transcript* (D. 271) (Add. No. 2) at 63:7-10.

complete knowledge and consent of Schrom and CSI, the court awarded damages against CSI in an amount calculated by the total sales that were "tainted" by CSI's interference. *Id.* at 17. Specifically, using Steven's commissions to reverse engineer the total amount of sales made by CSI under Stevens' management, the trial court awarded an amount equal to "a fair approximation of the net profits for these sales" based upon margins identified by the parties. *Id.* at 17-18.

On appeal, CSI offered arguments similar to Respondents that the trial court could only have based its award on the loss of sales sustained by NAMCO rather than the wrongful profits made by CSI in selling telephone directory cover advertisements. *Id.* at 25; *Defendants' Brief* (Reply Add. No. 2) at 9-10. In response, NAMCO offered several authorities and policy arguments, all adopted by the Massachusetts Supreme Judicial Court in rendering its final opinion:

> Considerations of policy also support the measure of damages chosen by the trial court. There is no doubt that NAMCO was injured by CSI's interference with the decree. NAMCO and CSI are direct competitors for advertising sales in the New England states. . . . Theoretically, perhaps, the profits on sales lost by NAMCO was a measure of NAMCO's damages. On the facts of this case, however, that measure of damages could not be employed. . . .
>
> Unless NAMCO receives some form of compensation for its injury, its rights under the consent decree are of little value. By inducing Stevens and others to violate the decree, CSI obtained a sales manager with extensive experience in the industry and a cadre of salesman already familiar with the product and territory. . .
>
> In cases such as this, where the injury is clear, but plaintiff's loss cannot be precisely measured, it is appropriate to invoke the equitable principal of unjust enrichment and to require the defendant to disgorge the profit derived from his wrongful conduct.

Id. at 26-28 (citations omitted); *Natl. Merchandising*, 348 N.E.2d at 775-76.

Similarly, on the facts of this case, where the injury is clear, but where TruGreen's loss cannot be precisely measured, it would be appropriate to permit an unjust enrichment measure of damages and require Respondents to disgorge the gains derived from their wrongful conduct.

Order Addressing Certification (D. 275) at 2 ("the court believes that TruGreen has proven the fact of damages but that questions remain as to the amount of damages"). Mower Bros, at the direction of Babilis, procured the employment of Mantz, a former TruGreen branch manager, as its regional marketing manager. Under Mantz's management, and with the knowledge and consent of Babilis, Mower Bros. further solicited the employment of numerous employees in both Utah and Idaho, including branch marketing managers and veteran sales representatives with extensive experience in the competing products and territories of TruGreen. *Opening Brief of Petitioners* at 8-9, ¶¶ 10-15. These solicitations included the direct procurement by managers Mantz and Gaythwaite of sales representatives LeBlanc and Stephensen in violation of their respective non-interference covenants. *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at xxix-xxx, xxxix, xliii-xlv, ¶¶ 85-88, 135-38, 156-68 (testimony of LeBlanc and Stephensen regarding their recruitment to Mower Bros.). Under Gaythwaite's management, and in violation of his non-competition restriction, the Mower Bros. Salt Lake Branch has realized an amount of revenue which Mantz—at least in March 2006—directly attributes to Gaythwaite's training and supervision. *Opening Brief of Petitioners* at 13, ¶ 27; Exhibit J to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178). LeBlanc, in turn, and in violation of his own non-competition restriction, was the highest producing Mower Brothers sales representative for 2006. *Id.* Likewise, under the management of another former TruGreen employee, Matt Walker, the Mower Bros. Ogden Branch has realized significant revenues in which Stephensen was also the highest revenue generator for 2006. *Id.*

Permeating this marked sales growth "despite the dramatic drop" in Mower Bros.' direct mailing are breaches of non-disclosure covenants that remarkably share the same definition of "confidential information," almost verbatim, as that of Scotts. Exhibits B1-9 to *Memorandum in*

Support of Plaintiffs' Motion For Summary Judgment (D. 178). In an industry that heavily relies upon confidential and experience-tested marketing methods to sell its products (again, as evidenced by the dollar-per-inquiry analysis of Mantz's email), both TruGreen and Respondents recognize that damages resulting from the breaches of their respective agreements are difficult, if not impossible, to measure. *Id.* When a former TruGreen manager or sales representative—just like a Scotts employee—is induced to violate the non-competition, non-disclosure, and non-interference provisions of his agreement,[15] it can be said that TruGreen has suffered loss even though TruGreen cannot demonstrate it would have made the same precise gains achieved by Respondents. *See supra* at Subsection B. Customers do not need two lawn services and are effectively "closed" from the market for a period of time even though TruGreen cannot show it would have sold to each specific customer in fact sold to by Respondents. *C.f. Intermountain Eye & Laser Centers, P.L.L.C. v. Miller*, 127 P.3d 121, 129 (Idaho 2005) ("that employers are entitled to protect themselves from competition for their existing and past customers cannot necessarily be extrapolated to mean those are the only customers that an employer can protect").

Under these circumstances, therefore, this Court is justified in following the holding of *Natl. Merchandising* and permitting the recovery of Respondents' gains for tortious interference. The injury to TruGreen is clear and the District Court has so found. To allow Respondents escape from liability on the basis of immeasurable loss (for which the District Court should probably have granted injunctive relief[16]) would render TruGreen's rights under the Non-

[15] *Feb. 13 Summary Judgment Order* at 34.

[16] Even so, like *Natl. Merchandising*, the injunctive relief in this case would have been in many respects too little too late. *Plaintiff's Brief* (Reply Add. No. 1) at 28. Employees were already recruited in violation of the non-interference covenants and information already disclosed. Furthermore, with respect to covenants of non-competition, the District Court openly expressed reservations about the limited value of imposing a "three- or four-month period" of injunctive relief. *Order Denying Motion For Preliminary Injunction* (D. 113) at 7. If there is no disgorgement of gains in a case like this then Respondents have little to fear of any subsequent Court sanction.

Compete Agreements of little value. Where TruGreen can identify a measure of gains "tainted" by Respondents' interference that are attributable to precise employees, times, and geographic areas prohibited by their terms of non-competition an unjust enrichment measure is reasonable. In an aggravated case where Respondents have deceptively contrived to create the opportunity for massive breaches of contract by a number of other persons the admonition that Respondents bear the burden of a "punitive" measure is especially applicable. *See Natl. Merchandising*, 348 N.E.2d at 776. It is after all Respondents' wrongful actions, and not that of TruGreen, that has led the parties to this juncture.

II. Disgorgement of Respondents' gains is an appropriate measure of damages in this case for breach of contract.

Courts have developed tools to enable them to enforce contracts when a traditional measure of damages is unavailable due to uncertainty and difficulty in quantifying the harm. These tools include liquidated damages provisions and injunctive relief. The District Court in this case inexplicably declined to award injunctive relief to TruGreen for the employee-Respondents' contract breaches, suggesting a money damage remedy was available. The question before this Court is whether a disgorgement measure of such money damages or no money damages at all is an appropriate remedy here. The Court is specifically confronted with the question of whether to allow Respondents to breach a contract without "disgorging" its ill-gotten profits unjustly gained directly from the breach on some hypertechnical theory. Of course, to do so would eviscerate the fundamental purpose of contract law; to hold parties to their proffered and agreed upon performance. As a policy matter, parties should not and generally are not allowed to breach existing contracts without consequence whenever a "better deal" comes along.

This case presents a scenario in which a contract breach has occurred, but damages are difficult, if not impossible to quantify. The case is complicated by the fact that generally available legal implements (injunctive relief) created to respond to such scenarios such as this, are no longer in play. To deny TruGreen any form of relief under the circumstances would constitute an implicit approval of Respondents' breach. This implicit approval introduces a dangerous and unwanted element into contract law that undermines stability and reliability; uncertainty of performance created by inadequate remedies. Under this scheme, a breaching party has no fear of breaching its duty to perform if it does so knowing that the breach will return more in profits than the cost of damages for the breach. This concept is antagonistic, irreconcilable and inapposite to the very theory of contract law. Yet this is exactly what the Respondents request this Court to do.

Respondents' approach to the question at hand can be summed up easily: deny TruGreen any measure of damages. It would be folly to do so. To follow Respondents' advice would create a scenario under which breach of contract would be deemed legitimate and even desirable. If parties cannot rely on an agreement to perform in a prescribed and mutually acceptable manner, of what worth is a contract?

Respondents have cited cases in support of their contention that contract law limits recovery for breach of contract to a "lost profits" measure of damages. Although this contention has merit in many breach of contract cases, in certain cases it clearly does not. It is wholly inapplicable in select cases of breach of non-competition, non-solicitation, and/or non-interference agreements where the breaching party gains more by breaching than the damages suffered by the non-breaching party.

A. Limiting damages to a "lost profits" measure of damages is inconsistent with the contract theory of damages and unsupported by the principles espoused by the *Restatement (Second) of Contracts.*

Restatement (Second) of Contracts Section 344 provides for three types of damages: expectation, reliance, and restitutionary damages. Section 344 reads:

> Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:
>
> (a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
>
> (b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
>
> (c) his "restitution interest," which is his interest in having restored to him ***any benefit that he has conferred on the other party.***

(emphasis added.) That the "expectation interest" measure of damages and its goal of putting the non-breaching party "in as good a position as he would have been in had the contract been performed" is understandably the primary remedy in a breach of contract action is inarguable. The drafters of the *Restatement (Second) of Contracts*, however, recognized something that Respondents clearly have not; namely, that contract damages must be flexible in order to properly address a wide variety of factual scenarios. Hence the secondary remedies of the "reliance interest" measure of damages and the "restitution interest" measure of damages.

Respondents nakedly advocate for rote and myopic application of damages principles. Their urging flies in the face of the caveat provided in Section 344 that "[t]he interests described in this Section <u>are not inflexible limits on relief</u> and in situations in which a court grants such a relief as justice requires, <u>the relief may not correspond precisely to any of these interests</u>." *Id.* at *Comment a.* Restatement (Second) of Contracts clearly recognizes that there are instances in which justice requires flexibility in applying the foregoing damages principles.

Such is the case here. Respondents' desire to limit damages to an unavailable "lost profits" measure of damages is not only convenient but wholly fails to adequately address the case at hand, a case in which multiple individuals have chosen to knowingly and willingly do exactly what they contracted not to do. In essence, Respondents have chosen to roll the dice in hopes that the damages they incur as a result of their respective breaches are materially less than the profits obtained as a result of the breach. They knowingly, willfully and profitably breached their respective agreements and a disgorgement of profits is an appropriate remedy.

B. Case law supports a disgorgement of profits in specific situations.

As Respondents emphasize in their Brief, there is a large amount of case law illustrating that the expectation damages, reliance damages and restitutionary damages as traditionally applied are adequate and sufficient remedies in a majority of cases. However, the cited cases are not exhaustive, nor are they dispositive of the issue before the Court. In fact, the cases cited by Respondents are factually dissimilar to the present case and the principles espoused therein (as proposed by Respondents) fail to provide any meaningful remedy to the situation at hand. That Respondents' crabbed reading of the remedies provided by the *Restatement (Second) of Contracts* creates an inequitable result in this case is beyond dispute. That case law has recognized that scenarios exist in which a disgorgement of profits is the proper remedy is also beyond dispute.

The United States Supreme Court recognized in *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932), that a disgorgement of profits was an appropriate equitable remedy of compensatory damages based on the wrongdoer's unjust enrichment. *Id.* at 456-457. Years later, the Court reaffirmed this principle in *Snepp v. United States*, 444 U.S. 507 (1980).

In *Snepp*, the Court confronted the question of whether a disgorgement of profits as a measure of damages could be sustained for a breach of an employment contract.

Frank W. Snepp III was a former Central Intelligence Agency (CIA) agent who, as part of his employment with the government, signed an agreement that stated he would "not...publish...any information or material relating to the agency, its activities or intelligence activities generally, either during or after the term of [his] employment...without specific prior approval by the agency." *Id.* at 507. Subsequent to his departure from the CIA, Snepp wrote a book about certain CIA activities in South Vietnam. He did not submit it to the CIA for prepublication review and clearance as required by his executed agreement with the government.

The district court found that Snepp had "willfully, deliberately, and surreptitiously breached his position of trust with the CIA and the secrecy agreement" and had deliberately mislead CIA officials into believing he would submit his book for prepublication review and clearance prior to its public release. *Id.* at 508. Given Snepp's calculated breach of his employment agreement, the district court imposed a constructive trust on all profits from the sale of the book (thereby effectively causing Snepp to disgorge all profits from the sale of the book). *Id.* The Court of Appeals accepted the findings of the district court that Snepp had breached a valid contract, and affirmed the finding that in so doing, he had caused "irreparable harm" to the government's vital intelligence activities. The Court of Appeals, however, differed in its opinion regarding the imposition of a constructive trust and did not award any damages. *Id.* at 509. The Supreme Court disagreed.

The Supreme Court instead found that Snepp had a contractual duty to submit his book for prepublication review if it contained information (classified or otherwise) gleaned as a CIA officer. *Id.* Although the district court and the Court of Appeals both found that the government had been subject to "irreparable harm and loss," (*id.* at 509-

510) the Supreme Court recognized that "[n]o one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable." *Id.* at 514. It then highlighted the fact that, given the unquantifiable nature of the government's harm, a traditional measure of damages was inadequate. *Id.* It stated, "Nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial [based on a tort theory of recovery] are speculative and unusual." *Id.* Instead, the Court found that a constructive trust effectively prevented Snepp from being unjustly enriched from his breach of the employment agreement. *Id.* In explanation, the Court stated, "[T]he trust remedy simply requires him [Snepp] to disgorge the benefits of his faithlessness [his breach of the employment agreement]...since the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain." *Id.* at 515-516.

The Supreme Court not only laid the foundation for a disgorgement remedy for a breach of contract, but also directly confronted the argument proposed by Respondents here that the damages awarded be directly proportional to the loss. To avoid the injustice that this result produces in cases where a breach has occurred but damages are unquantifiable, the Supreme Court linked the damages awarded directly to the breach and the profits derived specifically from the breach.[17]

In a case with strikingly similar facts, the British Court of Appeal also condoned the remedy of disgorgement of profits for breach of contract. In *Attorney General v.*

[17] Although one may argue that *Snepp* is actually a case based on a breach of a fiduciary duty, the Court's finding that Snepp owed the government a fiduciary duty was inextricably linked to his contract. Snepp's breach of his fiduciary duty was a direct consequence of his breach of his employment contract. That the Court focused on the resultant breach of Snepp's contractually based fiduciary duty merely indicates that the Court recognized the unquantifiable nature of the harm done to the government and fashioned a fitting remedy under an appropriately non-controversial label.

Blake [2001] 1 AC 268[18] (Reply Add. No. 4), the Court dealt with a former security and intelligence services officer who was a "notorious, self-confessed traitor" who, after escaping from prison and fleeing to Moscow in 1966, wrote an autobiography in 1989. *Id.* at 1. He entered into a publishing agreement in 1990 with Jonathan Cape Ltd., a publishing house, wherein he granted Jonathan Cape exclusive rights to publish the book in return for royalties. Jonathan Cape agreed to pay him advances against royalties. *Id.*

The book, when published on September 17, 1990, no longer contained any confidential information. *Id.* Nevertheless, the Court of Appeals found that Blake's publishing of the book violated a declaration under the Official Secrets Act signed by Blake upon entering service for the government. *Id.* at 2. Similar to the contract at issue in *Snepp*, the Court found that Blake was required to first obtain clearance before publishing his book. *Id.* By publishing his memoirs without prior approval, Blake had breached his contract with the government. *Id.* The Court awarded the government profits (the royalties due Snepp from Jonathan Cape) directly attributable to Blake's breach of contract. *Id.* at 11. In so doing the Court took the opportunity to elaborate on the state of contract law and its recognition of restitutionary damages and a claim for profits made from a breach of contract.

The Court prefaced its review by stating that a claim for profits under a breach of contract theory was only available in appropriate situations. Situations that fall into broad categories of "skimped" performance and instances where the defendant obtained his profit by doing "the very thing" he contracted not to do. *Id.* at 9-10. The Court reviewed the state of the law with respect to contract damages, noting that damages

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[18] Available at http://faculty.law.ubc.ca/biukovic/supplements/Attorney%20General%20v%20Blake.htm (attached hereto) and http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000727/blake-1.htm.

unattached to actual harm were awarded in property cases and a disgorgement of profits was a remedy in other scenarios such as unauthorized use of patents, and reached the following conclusion:

> My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression "restitutionary damages". Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

Id. at 8-9.

The *Blake* Court recognized that "[t]he law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer." *Id.* at 9. Noting that a disgorgement of profits is appropriate in certain circumstances, the Court implicitly provided some guidelines to determine when an accounting or disgorgement of profits is available. Three factors that it identified were: 1) The breach was "cynical and deliberate;" 2) the breaching party, thanks to the breach, was able to enter and entered into a more profitable contract elsewhere; and 3) by "entering into a new and more profitable contract the Defendant put it out of his power to perform his contract with the Plaintiff." *Id.* at 10. When these factors accompany a breach of contract, a disgorgement of profits may very well be an appropriate remedy. That each of these factors is present in the case at hand is beyond peradventure.

There is a large amount of academic literature on the subject championing the cause and rallying for a recognition of a disgorgement measure of damages in contract (whether it be termed "unjust enrichment," "disgorgement," or "restitution").[19] Case law has caught up with this movement in some instances. For example, the Colorado Supreme Court found that a "restitution of profits" was an appropriate remedy in *EarthInfo, Inc. v. Hydrosphere Resource Consultants, Inc.*, 900 P.2d 113 (1995).

The underlying facts of this *EarthInfo* are as follows. Between 1986 and 1988, Hydrosphere Resource Consultants, Inc. ("Hydrosphere") entered into several software development contracts with U.S. West, Inc. ("US West") under which it received royalty payments as well as a fixed hourly development fee. *Id.* at 116. On February 10, EarthInfo, Inc. ("EarthInfo") acquired US West and agreed with Hydrosphere to honor Hydrosphere's existing contracts. *Id.* at 116. Under the contracts, the royalties were to be calculated "as a percentage of net sales". *Id.* Both parties fulfilled their obligations for over a year, but on June 30, 1990, Hydrosphere claimed that EarthInfo should pay royalties on new derivative products. *Id.* EarthInfo disagreed. *Id.* On October 30, 1990, EarthInfo informed Hydrosphere that it would not pay any royalties on either the main products or the derivative products while disputing royalties on the derivative products. *Id.* Attempts to reach an agreement with respect to the royalties were fruitless and Hyrdrosphere filed a breach of contract action on January 11, 1991. *Id.* At trial, the district court ruled that EarthInfo did not owe royalties on the derivative products, but that it had breached its contract with Hydrosphere by unilaterally suspended all royalty

[19] Peter Birks, Restitutionary Damages for Breach of Contract: Snepp and the Fusion of Law and Equity, 1987 Lloyd's Mar. & Com. L.Q. 421; Hanoch Dagan, Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory, 1 Theoretical Inquiries in Law 115 (2000); Gareth Jones, The Recovery of Benefits Gained From a Breach of Contract, *99 Law Q. Rev. 443 (1983);* Stephen A. Smith, Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement, *115 Law Q. Rev. 245 (1999).*

payments on the other products. *Id.* The trial court ordered that the contract be rescinded as of June 30, 1990 (the last date that EarthInfo paid royalties), finding that "the breach was substantial" and that "due to the nature of the contracts between the parties and the depth of their disputes, damages would be inadequate." *Id.* The trial court entered final judgment of $185,772.91 in favor of Hydrosphere. *Id.* at 117. The Court of Appeals affirmed. *Id.*

The Colorado Supreme Court found that "whether a party that breach a contract can be required to disgorge to the non breaching party any benefits received as a result of the breach" had not been previously addressed. The Court affirmed the trial court's decision, granted rescission (as both parties requested), and ordered restitution. *Id.* at 118. That restitution came in the form of disgorgement of the defendant's gain as ordered by the trial court. *Id.* The Court further stated that "[g]enerally, the mere breach of a contract will not make the Defendant accountable for benefits thereby obtained, whether through dealings with a third person or otherwise…<u>If, however, the Defendant's wrongdoing is intentional or substantial, or there are no other means of measuring the wrongdoer's enrichment, recovery of profits may be granted.</u>" *Id.* at 119 (emphasis added). In essence the Court found that a disgorgement of profits was appropriate when the defendant accrued the profits as a result of an "intentional" or "conscious" and "substantial" breach. *Id.* at 120. In the present case, the same can be said.

CONCLUSION

For the reasons stated above, therefore, TruGreen respectfully requests that this Court answer in the affirmative to the certified questions of state law presented by the District Court.

DATED this 23rd day of January, 2008.

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ADDENDUM

Pursuant to Utah R. App. P. 24(a)(11)(C), copies of the following are submitted herewith: *Natl. Merchandising v. Leydon* Plaintiff's Brief, *Natl. Merchandising v. Leydon* Defendant's Brief, Ryan Mantz email dated March 6, 2006, (Exhibit J to *Memorandum in Support of Plaintiffs' Motion for Summary Judgment* (D. 178)), and *Attorney General v. Blake* [2001] 1 AC 268.

PLAINTIFF'S

BRIEF

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CASES

OTHER AUTHORITIES

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 75-193

Middlesex County Sitting, 1975

NATIONAL MERCHANDISING CORPORATION,
Plaintiff-Appellee,

v.

COMMUNITY SUBSCRIBERS, INC., et al.,
Defendants-Appellants.

NATIONAL MERCHANDISING CORPORATION,
Plaintiff-Appellee,

v.

EDWARD J. LEYDEN,
Defendant-Appellant.

On Appeal from Judgments of the Superior Court

BRIEF FOR THE APPELLEE NATIONAL MERCHANDISING CORPORATION

PROCEEDINGS BELOW

This case arises on appeals by the defendants from judgments entered in two proceedings which were tried together in the Superior Court. One proceeding was a petition for civil contempt brought by National Merchandising Corporation ("NAMCO") against Edward J. Leyden, a former employee of NAMCO, for violation of a consent decree entered by the Superior Court on January 26, 1973, enjoining Leyden and others from competing with NAMCO in a stated area until

September 30, 1974.[1] The second proceeding was an action brought by NAMCO against Community Subscribers, Inc. ("CSI") and its president and treasurer, Samuel H. Schrom. In that action NAMCO alleged, in Count I of the Complaint, that CSI and Schrom knowingly induced Leyden and other former employees of NAMCO subject to the consent decree to violate the decree; and, in Count II, that CSI and Schrom had engaged in unfair and deceptive sales practices to the injury of NAMCO. CSI filed a counterclaim in this action, alleging that NAMCO had also engaged in unfair sales practices.

The trial court, with the assent of the parties, ordered that Count I of the Complaint against CSI and Schrom be consolidated for trial with the contempt petition against Leyden (I Tr. 5-11, 117-118, 229; App. 71).[2] Count II in the

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[1] The papers in the contempt proceeding against Leyden are captioned "*National Merchandising Corporation* v. *Edward J. Leyden* or "*National Merchandising Corporation* v. *Creative Marketing Associates, Inc., et al.*," Middlesex Superior No. 33962. Creative Marketing Associates, Inc. was the lead defendant in the action which resulted in the consent decree, for violation of which the contempt proceeding was brought against Leyden.

[2] The record appendix consists of three volumes. The first volume, captioned "Appendix," contains the docket entries, pleadings, the findings of fact and order for decree, the judgment and related papers. The second and third volumes, captioned "Transcript Volume I" and "Transcript Volume II," consist of the transcript of the trial testimony. References to the first volume will be by the letters "App." followed by the page number. References to the second and third volumes will be by the designation "I Tr." or "II Tr." followed by the page number. Exhibits are identified by the exhibit number.

The papers in the Leyden contempt proceeding were not included in the three-volume record appendix referred to in the previous paragraph, but will be before the Court in the form of a Supplemental Appendix filed by the defendants. References to these papers will be made by the designation "Supp. App.," followed by the identification of the paper referred to.

action against CSI and CSI's counterclaim were deferred until a later date.[3]

On October 4, 1974, after five days of trial, the Superior Court (Beaudreau, J.) made findings of fact and an order for a decree in favor of NAMCO in both proceedings (App. 71).

On December 10, 1974, a judgment was entered in the action against CSI and Schrom awarding NAMCO both injunctive relief and damages. The judgment enjoined CSI and Schrom until January 1, 1976:

> (i) From employing former employees of NAMCO subject to the consent decree, whether as employees or independent contractors, for the purpose of soliciting or selling advertisements for telephone directory covers or for planning, supervising or managing such solicitation or sales in the New England states;
>
> (ii) From making payments to the persons subject to the consent decree based in whole or in part on the amount of sales of advertising on telephone directory covers in the New England states;
>
> (iii) From accepting orders or contracts obtained or negotiated by the persons subject to the decree for advertising on telephone directory covers received from the New England states; and
>
> (iv) From accepting orders or contracts for advertising on telephone directory covers received from the New England states, which orders or contracts have been obtained or negotiated by salesmen whose sales activities have been planned, supervised or maneged by persons subject to the decree (App. 86-88).

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[3] NAMCO also instituted contempt proceedings against George S. Stevens and John Rotondo who, like Leyden, were former NAMCO employees subject to the decree. Stevens and Rotondo, however, objected to a consolidated trial, and their cases were postponed (I Tr. 20-21, 103-120).

It is noteworthy that the injunction against CSI and Schrom runs until January 1, 1976, whereas the consent decree ran until September 30, 1974. In that respect, the judgment against CSI and Schrom has the effect of compensating NAMCO in kind, as it were, for the time lost by NAMCO from the operative period of the consent decree because of the wrongful actions of CSI and Schrom.

The judgment against CSI and Schrom also awarded NAMCO compensatory damages in the amount of $27,462 (App. 88).

Subsequently the Court made an order *nunc pro tunc* under Mass. R. Civ. P. 54(b) for the entry of final judgment on Count I only in the action against CSI and Schrom (App. 98).

On December 10, 1974, judgment also was entered on the contempt petition against Leyden, enjoining him until January 1, 1976 "from soliciting or selling advertisements for telephone directory covers and from planning, supervising or managing such solicitation or sales . . . [in the New England states]." The judgment against Leyden awarded NAMCO compensatory damages of $5,784.26 for Leyden's violation of the consent decree (Supp. App., Judgment).

Appeals were duly claimed by the defendants in both actions (App. 90; Supp. App., Appeal).

STATEMENT OF FACTS

Parties

Plaintiff NAMCO, which has its offices and plant in Natick, Massachusetts, is engaged in the business of selling advertising on plastic covers for telephone directories and of manufacturing and distributing the covers on which the advertising appears (I Tr. 159-160).

Defendant CSI, which has its principal place of business in East Rochester, New York, is also engaged in the business of selling advertising on, and of manufacturing and distributing, plastic covers for telephone directories (App. 4, 58, 60; I Tr. 31-32, 197-198; II Tr. 72-73). CSI also prints a line of paper products, but these products represent only 20% of the company's sales. The remaining 80% of the company's sales come from the telephone directory cover business. (I Tr. 29-30, 50, 162-163; II Tr. 205-211) CSI sells telephone directory cover advertising in the New England states, and is in direct competition with NAMCO in these states (I Tr. 31-32, 180; App. 60, 61, 67-68).

Defendant Schrom is the president and treasurer of CSI. He also is a director, stockholder and founder of CSI, which he organized in January, 1972. (I Tr. 197-198) From 1966 until May, 1971, when Schrom resigned from the company, Schrom was employed by NAMCO. At the time of his resignation he was a vice president of NAMCO. (I Tr. 183-184; II Tr. 105, 107, 213)

Defendant Leyden is a former NAMCO salesman (Supp. App., Petition and Answer; II Tr. 150, 215-216), subject to the consent decree entered by the Superior Court on January 26, 1973 (Ex. 1; App. 47). Leyden was hired by CSI in early 1974 (II Tr. 150). It is alleged in the contempt petition against Leyden, and admitted in Leyden's answer, that in the period January March of 1974, while the consent decree was operative, he solicited advertising for telephone directory covers on behalf of CSI from 17 business companies in Connecticut and made sales to nine of those companies, all in violation of the consent decree. It is also alleged in the contempt petition, and admitted by Leyden, that each of the companies solicited by him had been a customer of NAMCO. (Supp. App., Petition ¶ 4-6 and Answer)

Litigation Resulting in the Consent Decree

In mid-1972 Terrance M. Carter and Irwin H. Schneider, then employees of NAMCO, organized Creative Marketing Associates, Inc. ("CMA") to sell advertising on telephone directory covers in competition with NAMCO. Once CMA was established, Carter and Schneider left NAMCO, taking with them 18 other NAMCO salesmen, including Leyden, George S. Stevens, John Rotondo and Sanford L. Griff (II Tr. 213-218). In August, 1972, NAMCO brought an equity suit in the Superior Court for injunctive and other relief against CMA and the NAMCO salesmen who had joined CMA (I Tr. 30-31). This suit resulted in the entry of the consent decree of January 26, 1973, which enjoined certain defendants, including Leyden, Stevens, Rotondo and Griff, "until and including September 30, 1974 . . . from soliciting or selling advertisements for telephone directory covers, from planning, supervising or managing such solicitation or sales, and from engaging in the manufacture or distribution of telephone directory covers, either on his . . . own behalf or as an agent or employee of any person, firm or corporation, in [14 states, including the 6 New England states]" (Ex. 1; App. 47).

Summary of the Evidence and Findings Relating to Liability

Neither CSI nor Schrom was a defendant in the action which resulted in the consent decree. Nonetheless, Schrom was informed of the progress of that suit.

In the fall of 1972, after NAMCO had brought suit against CMA and the former salesmen employed by CMA, Schrom attended a party given by CMA to celebrate the opening of its business. At that time, Schrom was informed by Carter and Schneider that an action had been brought by NAMCO, and he was informed further that the defendants in that action had agreed to a settlement which would prevent them from selling telephone directory covers. (II Tr. 87-88, 101, 117-118)

In January, 1973, Schrom had a meeting with Terrance L. Goan, a defendant in the suit by NAMCO against CMA, at which arrangements were discussed for creating a telephone directory cover business in Michigan to be run by Goan. In the course of that meeting it was said, either by Schrom or in his presence, that Michigan had been selected because it "was not one of the states that was in a court order that had been obtained by [NAMCO] against Mr. Terry Carter and his complement of people, of which Mr. Goan, Mr. Steven[s], [and] Mr. Rotondo were all part of."[4] (II Tr. 183-187)

In early 1973 Schrom received reports from a number of other former NAMCO salesmen about the disposition of the action against CMA (II Tr. 98-99).

In early February, 1973, Arthur M. Sells, president of MCO, met with Schrom concerning the settlement of litigation between NAMCO and CSI then pending in New York. Lawyers for NAMCO and CSI were present during the meeting. When Schrom or his lawyer proposed that CSI sign a settlement agreement, Sells replied that he would accept nothing less than a consent decree of the type NAMCO had obtained in its suit against CMA in Massachusetts. (Ultimately the New York litigation was concluded by the entry of a consent judgment against CSI and other defendants.) (App. 63; II Tr. 190-193, 201-203)

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[4] Schrom and Goan were mistaken in their understanding that Goan was subject to the consent decree. He was named as a defendent in the suit, but he was one of the seven individual defendents whose assents to the decree were not received. As to these seven defendants, the complaint was dismissed without prejudice. (Ex. 1, ¶ 5)

Schrom claimed that he did not learn of the consent decree entered in the Massachusetts actions until May, 1974, when he received a registered letter from NAMCO's attorneys enclosing a copy of the decree (II Tr. 89-94). The trial court, however, found that "as early as February, 1973, Samuel H. Schrom, president of CSI, had actual knowledge of the consent decree entered into on January 26, 1973" (App. 75).

In September, 1973, Schrom hired Stevens to work for CSI (I Tr. 301 II Tr. 43). From 1966 until August, 1972, when he left NAMCO to join CMA, Stevens had been employed by NAMCO as a manager, planner and supervisor of NAMCO's telephone directory cover business (I Tr. 54-55, 183-184). During most of that period Schrom also was employed by NAMCO (Tr. I, 184; Tr. II, 105, 107). Schrom hired Stevens because he knew Stevens had good management ability (II Tr. 147-148). Schrom knew that Stevens had been named as a defendant in the suit by NAMCO against CMA and, by his own admission, was aware that Stevens had agreed not to compete with NAMCO (II Tr. 87-89).

The oral employment agreement between CSI and Stevens provided that Stevens would receive a commission on all sales in New England of telephone directory cover advertising made by salesmen hired after Stevens started work for CSI. Stevens would not receive a commission on sales made outside New England or on New England sales by salesmen already employed by CSI when Stevens joined the company. (I Tr. 56-59, 123-125, 128; II Tr. 58) Stevens received a 5% commission on the sales of newly hired salesmen until CSI had recaptured the cost of their training; the commission rate then went up to 10% (I Tr. 188; II Tr. 60). Under this arrangement, Stevens received commissions of $23,199 during the period from September, 1973, when Stevens started work for CSI, until the time of the trial in late September, 1974 (I Tr. 43-49, 58-59, 90-102, 121-123, 130-135; II Tr. 20-28, 121; Ex. 17). Those commissions represent 8.45% of CSI's total sales of advertising on telephone directory covers in New England during that period, exclusive of sales made by Stevens directly.[5] A clear inference arises, therefore, that Stevens received his commission in the 5-10% range on all, or virtually all, sales in the New England area. Stevens was compensated in the same manner while employed by NAMCO, i.e., by a commission on the sales of persons under his supervision, plus a standard salesman's commission on sales which he made directly. (I Tr. 54-55, 162, 183-184) In states outside of New England CSI sales managers also receive commissions on sales made by persons under their supervision (II Tr. 159).

In addition to supervising sales by others, Stevens also made direct sales of telephone directory cover advertising for CSI. In the late winter and spring of 1974 he made 15 direct sales of telephone directory cover advertising on Cape Cod, fully aware that he was acting in violation of the consent decree. (I Tr. 38-39, 78, 81, 147-152; II Tr. 50-51; Exs. 13, 14) From October through December, 1973 CSI's Massachusetts office was located in Stevens' home in Braintree (I Tr. 170-171). In January, 1974 the operation was moved from Stevens' home to a newly rented office in Waltham (I Tr. 139; II Tr. 54). The rental checks for the Waltham office are signed by Stevens (I Tr. 141). CSI reimburses Stevens for the expense of the Waltham office and for other CSI operating expenses

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[5] CSI's total New England sales of telephone directory cover advertising in the period from October, 1973 to September, 1974, exclusive of sales made by Stevens directly, were $274,621 (App. 77; II Tr. 28; Ex. 17). Sales of telephone directory cover advertising made by Stevens directly in that period produced commissions to him of $1,487.50. Dividing that figure by the applicable commission rate of 35% (25% standard salesman's commission, plus Stevens' 10% override) discloses that the total sales made by Stevens directly were $4,250. (I Tr. 57-63, 78, 81-83; II Tr. 25; Ex. 17) CSI's total New England sales of telephone directory cover advertising in that period, therefore, were $278,871 ($274,621 + $4,250).

paid by him (II Tr. 20-23). Training classes and sales meetings for CSI's telephone directory cover salesmen have been conducted at the Waltham office, in Stevens' presence (I Tr. 144-146). In early 1974 Stevens attended a sales meeting concerning the telephone directory cover program held at CSI's headquarters in East Rochester (II Tr. 187). On one of his trips to East Rochester in the spring of 1974, Stevens returned some telephone directory covers which in his opinion were of poor quality (II Tr. 62-63, 163, 172).

Stevens and Schrom testified that Stevens was employed by CSI to work in CSI's paper products division only and that Stevens did not plan, supervise or manage the sale of telephone directory cover advertising by others (I Tr. 174-174; II Tr. 122-125). The trial court made the following finding with respect to their testimony: "Irrespective of the alleged terms of that employment, *to which I give no credence*, I find that George Stevens, with the complete knowledge and consent of Samuel H. Schrom and C.S.I., planned, supervised and managed the sales of vinyl plastic telephone directory covers in the proscribed New England States during the proscribed period of time" (App. 74) [emphasis added].

In February, 1974, CSI hired defendant Leyden, also a former NAMCO salesman subject to the consent decree (II Tr. 47-48, 150). Thereafter Leyden received commissions of $5,784 from CSI for sales of telephone directory cover advertising made by him in New England (II Tr. 47-48, 94-95). Leyden was given a business card which identified him as area manager of CSI's "paper products division", but his sales efforts were confined exclusively to telephone directory covers, which are part of CSI's plastics division (II Tr. 155-157; Ex. 19). Obviously, the misleading business card was designed to conceal the fact that Leyden was acting in violation of the consent decree (App. 76). Schrom claimed that he was unaware of Leyden's activities until May, 1974, when he received a letter from NAMCO's attorneys and learned "much to [his] regret" that Leyden's employment by CSI was in violation of a court order (II Tr. 91-92). CSI's records showed, however, that Leyden received weekly commissions on telephone directory cover sales in New England continuously from the time he started work for CSI until late September, 1974, just before the start of the trial, when he was sent by CSI to Georgia[6] (II Tr. 46-49, 94-95; Ex. 17).

John Rotondo, also a former NAMCO salesman subject to the consent decree, was hired by CSI in November, 1973 (I Tr. 33-34; II Tr. 45-46; Ex. 17). Rotondo has received commissions of $10,339 from CSI for sales of telephone directory cover advertising made by him in New England (II Tr. 30-31). As in the case of Leyden, Rotondo received weekly commission checks on New England sales of telephone directory cover advertising from the time he started work for CSI until late September, 1974, shortly before the commencement of the trial (II Tr. 45-46; Ex. 17). Thus, CSI continued to pay Rotondo for activities which violated the consent decree even after Schrom received the letter in May, 1974 informing him of the decree's terms[7] (II Tr. 97-98, 158; Ex. 20).

Sanford L. Griff, also a former NAMCO salesman subject to the consent decree, was hired by CSI in October, 1973. The decision to hire Griff was made by Stevens, as was the decision to hire Rotondo. (I Tr. 33-34; II Tr. 46; Ex. 17) From October, 1973, until May, 1974, when he left CSI, Griff received

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[6]Leyden never appeared at the trial, despite the fact that the contempt petition against him was being tried together with the action against CSI and Schrom. Just before the trial, and after receipt of a letter from NAMCO's attorney requesting that Leyden, among others, be made available as a witness, CSI sent Leyden to Georgia. Schrom maintained that he had no knowledge of how to reach Leyden in Georgia, although he admitted that CSI knew where to send Leyden his weekly paychecks. (I Tr. 10-11; II Tr. 95, 131-134, 135-136; Ex. 18)

[7]Rotondo also was sent to Georgia by CSI just before the trial and did not appear at the trial, despite the request of plaintiff's attorneys that he be made available as a witness (II Tr. 133-134, 135-136; Ex. 18).

commissions from CSI of $2,470 for sales of telephone directory cover advertising in New England (II Tr. 31-32; Ex. 17).

In the action against CSI and Schrom, the trial court found, on the issue of liability: That "George Stevens, with the complete knowledge and consent of Samuel H. Schrom and C.S.I., planned, supervised and managed the sales of vinyl plastic telephone covers in the proscribed New England States during the proscribed period of time"; that "George Stevens from the inception of his employment with C.S.I. in September 1973 until September 18, 1974 was knowingly in violation of the terms and conditions set forth in the Consent Decree"; that "as early as February 1973, Samuel H. Schrom, President of C.S.I., had actual knowledge of the Consent Decree entered into on January 26, 1973"; that "at the time [Edward J. Leyden] became associated with C.S.I. . . . .Samuel H. Schrom, President of C.S.I., knew of the Consent Decree, and knowingly employed Leyden to solicit advertising for vinyl plastic telephone directory covers in the proscribed area of New England during the ensuing months of 1974 until September 18, 1974"; and that with "full knowledge of the 1973 Consent Decree, Samuel H. Schrom, President of C.S.I., knowingly continued George Stevens in the managerial capacity of sales of advertising for vinyl plastic telephone directory covers and intentionally interfered with the rights of NAMCO in the New England States during the proscribed period, as stated in the Consent Decree, and that said activity injured the legitimate business interests of NAMCO" (App. 74-76).

In the contempt proceeding against Leyden, the trial court found, on the issue of liability, that "Edward J. Leyden intentionally violated the terms of the Consent Decree in that he solicited advertising for telephone directory covers in the proscribed area . . . . [and] that the foregoing intentional violations did injure the legitimate business interests of NAMCO" (App. 76).

Summary of the Evidence and Findings Relating to Damages

NAMCO attempted to obtain production of CSI records as evidence at the trial, but its efforts were strenuously resisted by CSI.

Prior to trial, NAMCO's attorney wrote CSI's attorney, requesting the production of specified books and records (II Tr. 134, 135-136; Ex. 18). At trial, Schrom testified that he was unable to produce the records requested because they had been "stolen" from CSI's offices in East Rochester four days after NAMCO's attorneys mailed the letter requesting production of documents (I Tr. 3-5, 198-204).[8] When asked what type of records CSI kept showing total sales in a particular area, Schrom replied that there was a "town flow book" in which all sales in particular programs were recorded. That record, Schrom testified, was among those that had been stolen just before the start of the trial. (I Tr. 200-202) When asked what other records were available showing sales by areas, Schrom replied that it would be necessary to refer to the original contracts between CSI and its customers (I Tr. 199-200, 205-207). Production of those contracts was requested, but the defendants' attorney objected on the ground that it would be necessary to use "a trailer truck." At that point the trial judge said that he was "not going to entirely accept all this testimony here because it's a little too difficult for me to do," and he said it would be necessary that CSI produce the contracts, even "if it takes a truck." (I Tr. 208) It then developed, in further testimony by Schrom, that there were other records, referred to as "collection forms," which had not been stolen and which contained all the information that appeared in the town flow book (I Tr. 209-215). The trial judge ordered CSI to produce the collection forms, cancelled checks for payments to

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[8]NAMCO served a subpoena duces tecum on Stevens at CSI's Waltham office calling for the production of the same documents. At trial, Stevens produced one copy of a CSI newsletter. (I Tr. 74-75, Ex. 7).

salesmen, contracts with customers, and the cash disbursements journal (1 Tr. 217-223).

Schrom objected to the production of CSI records on the further ground that they contained trade secrets which should not be disclosed to a competitor. He objected to the production of the cash disbursements journal because it would disclose the names of CSI's suppliers and the prices at which CSI buys. For the same reason he objected to the production of whatever records would show CSI's profit or loss (because they would disclose CSI's "purchase power"). He also objected to the production of records of CSI's telephone directory cover programs, because those records would disclose the names of CSI's customers. The trial judge assured Schrom that arrangements would be made to protect the confidentiality of whatever business records were produced. (1 Tr. 223-228)

In order to protect the confidentiality of records produced by CSI, the trial judge appointed Richard Leavitt, a certified public accountant, as "an impartial examiner in the nature of a Master or Auditor" to examine the CSI records in conjunction with counsel for the parties (1 Tr. 245-248). Leavitt, who had been engaged originally by counsel for NAMCO, was instructed by the trial judge to consider himself impartial, to cooperate equally with both counsel and to submit his bill for services to the Court for payment (1 Tr. 245-246). Leavitt was instructed that "any information obtained [by him] shall be held in absolute confidentiality [by him] and shall be released and revealed only to the extent authorized by this Court," and he was further instructed to turn all work papers in to the Court at the conclusion of his examination (1 Tr. 246-247).

The CSI records examined by Leavitt, pursuant to the confidentiality order by the trial judge, consisted of the following: (i) a schedule of checks drawn by CSI payable to former NAMCO salesmen subject to the consent decree; (ii) a copy of CSI's cash disbursements journal, by which the schedule of checks could be verified; (iii) accounts receivable ledgers (referred to by Schrom as "collection forms") for telephone directory cover programs in New England during the period of Stevens' employment by CSI; and (iv) accounts receivable ledgers for "town book" programs (CSI's paper products division) in New England during the period of Stevens' employment by CSI (II Tr. 4-13).

Schrom and Stevens both denied that there was any record in existence itemizing the commissions paid Stevens. Leavitt therefore was forced to refer to other records to calculate the commissions paid Stevens for supervising the sale of advertising on telephone directory covers. First, Leavitt reviewed the schedule of checks (as amended by reference to the cash disbursements journal), which disclosed that Stevens had received a total of $40,222 from CSI from September, 1973 to September, 1974, including reimbursement of expenses, commissions on telephone directory cover programs and commissions on town book programs. Accepting as correct information from Schrom that approximately $10,000 of this sum was reimbursement for expenses,[9] Leavitt concluded that Stevens' commission income from CSI was $30,222. (II Tr. 20-23)

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[9] The payments to Stevens identified in CSI's cash disbursements journal as reimbursement of expenses come to $2,130 (II Tr. 41-43).

Leavitt next eliminated from Stevens' total commission income the amounts received by Stevens on the town book programs.[10] Leavitt then reduced commission income further by deducting the amount of commissions received by Stevens for sales of telephone directory cover advertising made by him directly (II Tr. 23-28). In this manner Leavitt was able to arrive at the commission income received by Stevens from CSI on sales of telephone directory cover advertising made by others, which he determined to be $23,199 (II Tr. 26-28, 121).

Having derived the total commissions paid Stevens for sales of directory cover advertising made by others, Leavitt compared that amount to CSI's total New England sales of telephone directory cover advertising during the period that Stevens was employed by CSI, exclusive of sales made directly by Stevens.[11] That comparison showed the overrides represented 8.45% of CSI's total sales (II Tr. 28-29), a percentage which clearly indicates that Stevens received his override, varying from 5-10%, on all of CSI's New England sales of advertising on directory covers during the period that he was employed by CSI (II Tr. 28).

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[10] The accounts receivable ledgers, both for the town book programs and the telephone directory cover programs, identified each sale by dollar amount and by salesman. Since the salesman's commission rate was known, it was an easy matter to calculate the amount of commissions received by Stevens for sales made directly by him, both of town book covers and telephone directory cover advertising. Stevens received an override commission on all town book sales by others in New England. The override rate on town book sales was fixed so it was also an easy matter to calculate the amount of overrides received by Stevens on town book sales. (II Tr. 8-13, 23-26) No other method of particularizing Stevens' commission income was available, because Schrom and Stevens both denied that there were accounting records in existence that would explain the commission payments made to Stevens (I Tr. 63-71, 203, 220-222). Since Stevens' override commission rate varied on telephone directory cover advertising sales (between 5-10%), it was not possible to derive his overrides on those sales from the accounts receivable ledgers. The only way to calculate those overrides was to eliminate the other (ascertainable) commissions from his total commission income, as was done by Leavitt.

[11] See fn. 5, *supra*.

Leavitt's examination disclosed that Stevens received override commissions from CSI on \$278,871 on telephone directory cover advertising sales in New England.[12] Since those commissions were paid to Stevens for planning, managing and supervising those sales, as the trial judge found (App. 74), it follows that CSI's sales in that amount were tainted by CSI's knowingly inducing Stevens and others to violate the consent decree entered in favor of NAMCO.

As noted above, Schrom strenuously resisted production of CSI's profit and loss records on the ground that they contained confidential information. He testified further that CSI does not maintain profit and loss records on particular programs. In order to calculate profit or loss on a segment of CSI's business (such as New England sales of telephone directory cover advertising), Schrom said, it would be necessary to start at the beginning and refer to original (and voluminous) records of CSI's costs for manufacturing the covers, administering the programs, delivering the completed covers, and the like. (I Tr. 224-226) With respect to the company's business as a whole, Schrom testified that CSI was operating at a profit and that the profit level was approximately 5% of sales (II Tr. 205-211). Arthur M. Sells, president of NAMCO, testified that NAMCO was operating at a profit level of 8-15% (II Tr. 193-196).

In the action against CSI and Schrom, the trial court found, on the issue of damages, "that the sum of \$27,462 awarded as compensatory damages represents ten percent of

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[12] See fn. 5, *supra*.

\$274,621.93,[13] which is the total of all telephone directory cover sales exclusive of the direct sales of George Stevens for the New England area" and "that this ten percent factor is a fair approximation of the net profits for these sales" (App. 77).

In the contempt proceeding against Leyden, the trial court found, on the issue of damages, that "from February 1974 until September 18, 1974 Edward J. Leyden received from CSI weekly commissions totaling \$5,784.26, exclusively for sales of advertising [on] vinyl plastic telephone directory covers, all in contravention to the Consent Decree" (App. 76).[14]

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[13] As noted before (fn. 5, *supra*) the total New England sales, including those made directly by Stevens, were \$278,871. The trial court used the lower figure, which omits direct sales by Stevens, in calculating the fair approximation of net profit.

[14] The total amount of Leyden's commissions was established by Leavitt's examination of CSI's books (II Tr. 47-49). It should be noted that CSI's books showed more sales by Leyden than he admitted in his answer. This perhaps explains why CSI sent Leyden to Georgia before trial.

ARGUMENT

I. THERE WAS AMPLE EVIDENCE THAT DEFENDANTS CSI AND SCHROM INTENTIONALLY INDUCED VIOLATIONS OF THE CONSENT DECREE.

An intentional violation of a legally protected interest subjects the wrongdoer to liability for the injury he causes. *Grammenos* v. *Zolotas*, 356 Mass. 594, 597 (1970); *Ross* v. *Wright*, 286 Mass. 269, 271 (1934) and cases cited; *Restatement of Torts*, §766 comment b. In this Commonwealth, the tort of intentional interference with legally protected interests has been recognized in cases involving rights under a written contract, *H.D. Watts Co.* v. *American Bond & Mortgage Co.*, 260 Mass. 599 (1927), employment agreements terminable at will, *Berry* v. *Donovan*, 188 Mass. 353 (1905), the right to conduct a lawful business, *Godin* v. *Niebuhr*, 236 Mass. 350 (1920), and an expectancy under a will, *Lewis* v. *Corbin*, 195 Mass. 520, 527 (1907). If the law protects an expectancy under a will from intentional interference, as in *Lewis* v. *Corbin*, then *a fortiori* the law should protect NAMCO's rights under a decree of the Superior Court against interference by a competitor.

Defendants Schrom and CSI do not deny that deliberate interference with the operation of the consent decree would subject them to tort liability. Rather, they argue that, "There was no evidence to support a finding that Schrom or C.S.I. intentionally induced or persuaded either Stevens or Leyden to breach their agreement [sic] with NAMCO" (Defendants' Brief at 8). This argument evinces a somewhat cavalier disregard of the evidence.

Despite Schrom's protestations to the contrary, it is clear that Schrom knew of the terms of the consent decree long before he hired Stevens, Leyden, or the other salesmen subject to the decree. Schrom first learned of the lawsuit against the former NAMCO employees and of the settlement negotiations then underway in the fall of 1972, when he attended a party given by CMA. He had further discussions concerning the consent decree in January, 1973 with Terrence Goan and with other salesmen subject to its terms, and there is evidence that Schrom sent Goan to Michigan to avoid the decree's reach. Finally, the decree was discussed in Schrom's presence in February, 1973 during negotiations between CSI and NAMCO concerning the settlement of litigation pending in New York. (II Tr. 87-88, 101, 117-120, 183-187, 190-192, 201-203) On the basis of this evidence, the trial court made a specific finding that "as early as February 1973, Samuel H. Schrom, President of C.S.I., had actual knowledge of the Consent Decree entered into on January 26, 1973" (App. 75).

Since Schron knew of the consent decree, he and his corporation, CSI, were under a duty to refrain from interfering with it. *Grammenos* v. *Zolotas, supra* at 597. The trial court concluded that Schrom had ignored his duty to respect the decree and had, in direct violation of its terms, hired George Stevens to manage CSI's sale of advertising on telephone directory covers in New England (App. 74-75).

The Court's finding is supported by the following facts, among others: Schrom and Stevens worked together for a number of years at NAMCO, where Stevens held a supervisory post similar to his position at CSI (I Tr. 183-184); Schrom was familiar with Stevens' reputation, respected his management ability, and wanted him available "for future growth patterns" (II Tr. 146-147); CSI paid Stevens' way to a meeting in Rochester in September, 1973, at which Stevens was hired (I Tr. 158); after being hired, Stevens set up a CSI branch office at his home in Braintree (I Tr. 170-171); Stevens was present during sales training sessions in CSI's Waltham office and attended a meeting of CSI's sales managers in early 1974 at which policies for the sale of advertising on telephone directory covers were formulated (I Tr. 144-146; II Tr. 187); Stevens engaged in direct sale of advertising on directory covers himself on at least fifteen occasions (II Tr. 51); and Stevens received "override" commissions on virtually all of the telephone cover programs sold by CSI in New England, the same method of compensation used by both NAMCO and CSI for their sales managers (I Tr. 54-55, 162; II Tr. 159).[15]

During the period from September, 1973 to September, 1974 CSI paid Stevens $23,199 (exclusive of commissions on direct sales), Rotondo $10,339, Leyden $5,784, and Griff $2,740 for sales of advertising on telephone directory covers made in violation of the consent decree (II Tr. 26, 30, 32, 48).

Coupled with this evidence were strong indications that CSI and its employees deliberately attempted to conceal the extent of their violation of the consent decree. For example, Leyden was given a business card identifying him as manager of CSI's paper products division even though his efforts were confined exclusively to sales of vinyl telephone directory covers (II Tr. 155,156; Exh. 19). Schrom initially failed to produce the records requested by NAMCO on the grounds that the records had been "stolen" in a mysterious theft which occurred four days after NAMCO mailed its request for production of documents, a tale which the trial court found "a little too difficult for me to [accept]" (I Tr. 3-5, 198-204, 208). Stevens

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[15] Schrom and Stevens testified that the override commissions paid to Stevens were not for services, but were in the nature of a "bonus", to ensure Stevens' availability for CSI's telephone directory cover programs when the consent decree expired (I Tr. 174-175, II Tr. 123-125, 147-148). That testimony simply was not credible. If the understanding was that Stevens would receive a guaranteed amount, as Schrom suggested (II Tr. 124), the amount would not have been computed as a percentage of sales. If the understanding was that CSI would pay Stevens to the extent it had the financial ability, and that its financial ability was measurable by the volume of its business, there was no occasion to limit the commission to sales in New England. When we consider, further, that the commission arrangement applied only to sales made by persons hired after Stevens went to work for CSI, and that the commission rate increased after the salesmen had been trained, the explanation given by Schrom and Stevens becomes progressively less credible.

make an independent examination of CSI's records, and report his findings. Leavitt reviewed CSI's accounts receivable ledgers, its cash disbursements journal, and a schedule of checks paid by CSI to persons subject to the consent decree. He reported his findings at length to the Court, and the worksheets showing his computations were admitted as Exhibit 17. (I Tr. 245-246; II Tr. 4-39). CSI now objects to the admission of Leavitt's testimony and computations on the grounds that his testimony was based on hearsay (Defendants' Brief at 11-12).

The short answer to CSI's objection is that it was not raised at the trial. Although formal exceptions have been abolished, it is still necessary that a party make known to the Court "his objection to the action of the Court and his grounds therefor. . . ." Mass. R. Civ. P. 46; See Mass. R. App. P. 2(a). During the trial, the Court inquired at length concerning the defendants' position on the admissability of Leavitt's testimony, but the sole objection raised was based on relevance not hearsay (II Tr. 16, 32–39).

Even if CSI's hearsay objection were properly before this Court, it would be without merit. In cases involving voluminous financial records, it is accepted practice to permit a bookkeeper or accountant to review the records and to summarize their contents. *Commonwealth* v. *Leonard*, 352 Mass. 636, 643 (1967); *Commonwealth* v. *Greenberg*, 339 Mass. 557, 581-582 (1959); *Boston and Worcester R.R. Corp.* v. *Dana*, 1 Gray 83, 104 (1854); *Cabel* v. *United States*, 113 F.2d 998, 1001 (1st Cir., 1940). It is not necessary that the records themselves be admitted in evidence; it is sufficient that the records would be admissable if offered, and that they are available in the courtroom for cross-examination. *Cornell-Andrews Smelting Co.* v. *Boston and Providence R.R. Co.*, 215 Mass. 381, 390-391 (1913); *Commonwealth* v. *Warner*, 173 Mass. 541, 548-549 (1899); *Dyecraftsmen, Inc.* v. *Feinberg*, 359 Mass. 485, 487 (1971); 4 Wigmore, *Evidence* §1230 (Chadbourn Rev. 1972).

Both prerequisites were satisfied in this case. The testimony of defendant Schrom, who was Treasurer of CSI, established that the records examined by Leavitt were kept in the ordinary course of CSI's business and would have been admissable under G.L. c.233 §78B (I Tr. 210-218). These records were available in the courtroom in the event that CSI's attorneys wished to cross-examine; in fact, under the trial court's protective order, they never left CSI's custody. If there were any errors or discrepancies in Leavitt's computations, CSI could easily have produced the records themselves. Rather than confront Leavitt with the records, defendants deliberately waived cross-examination (II Tr. 52). Indeed, Schrom testified specifically that he did not dispute Leavitt's figures (II Tr. 98). The hearsay objection therefore is without merit. *Cornell-Andrews Smelting Co.* v. *Boston and Providence R.R. Co.*, *supra* at 391.

III. THE TRIAL COURT CORRECTLY ASSESSED DAMAGES AGAINST CSI AND SCHROM BASED ON THE PROFITS MADE BY CSI IN VIOLATION OF THE CONSENT DECREE. IN THIS CASE, DAMAGES BASED ON CSI'S PROFITS ARE ESSENTIAL TO PROTECT NAMCO'S RIGHTS UNDER THE DECREE.

After finding that CSI and Schrom had intentionally induced Stevens, Leyden, and others to violate the terms of the consent decree, the trial court turned to the question of damages. The Court's starting point was the fact that Stevens, in violation of the decree, had planned, managed and supervised CSI's sales of telephone directory cover advertising in New England. The fruits of this conduct were gross sales of $274,621 in the New England states (App. 75-77). Schrom denied that there were any records showing CSI's profit margin on these New England sales, but he testified that CSI in general made a net profit of approximately 5% (II Tr. 205-211). The profits of NAMCO, a direct competitor of CSI in the New England market, range from 8% to 15% of gross sales (II Tr. 193-196). On this record, the trial court found that 10% of gross sales represented a fair approximation of CSI's profits on the sale of advertising on telephone directory covers in the New England states, and he awarded 10% of $274,621, or $27,462, as compensatory damages (App. 77).

Defendants object to the trial court's finding on damages on the grounds that there can be no award for "speculative and conjectural profits" (Defendants' Brief at 9). There is, however, no need for absolute precision in the computation of damages; a reasonable approximation is sufficient. *Rombola* v. *Cosindas*, 351 Mass. 382, 385-386 (1966); *Dalton* v. *Demos Bros. General Contractors*, 334 Mass. 377, 378-379 (1956); *Matushita Electric Corp. of America* v. *Sonus Corp.*, 1972 Mass. Adv. Sh. 1345; *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 563 (1931); See *Goddard* v. *Babson-Dow Mfg. Co.*, 319 Mass. 345, 350 (1946). The trial court's findings represent a reasonable approximation of CSI's New England profits and therefore are a proper measure of damages. It is significant, for example, that Stevens had been planning, managing and supervising sales of telephone directory cover advertising for more than six years when he went to work for CSI, and that CSI, at that time, was less than two years old (I Tr. 183-184, 198). It is reasonably inferable that CSI's New England division, under the management of Stevens, was operated more efficiently and more profitably than the company's business as a whole.[16]

Defendants also attack the trial court's findings on damages on the ground that the court should have based its award on the loss of sales sustained by NAMCO, rather than the wrongful profits made by CSI in violation of the decree (Defendants' Brief at 9-10). In support of this objection,

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[16] It is noteworthy that CSI claimed that the prices at which it buys are lower than the prices at which NAMCO buys and that its manufacturing cost is less (I Tr. 226; II Tr. 35). To the extent that profit is affected by costs, CSI's profits could be expected to exceed NAMCO's profits, which were in the 8-15% range (II Tr. 195-196).

defendants cite *H.D. Watts Co.* v. *American Bond & Mortgage Co.*, 260 Mass. 599 (1927), a case involving wrongful interference with contractual relations, and *Lufkins's Real Estate, Inc.* v. *Aseph*, 349 Mass. 343 (1965), a suit to enforce restrictive covenants in employment agreements.

In cases involving other types of interference with legally protected interests, however, the courts have awarded damages based on the wrongdoer's unjust profits rather than the injured party's loss. This principle has been applied in trademark cases, *Reading Stoveworks* v. *S. M. Howes Co.*, 201 Mass. 437, 441-443 (1909), cases involving unfair methods of competition such as "palming off", *Foster Mfg. Co.* v. *Cutter-Tower Co.*, 211 Mass. 219, 223 (1912), and civil contempt proceedings to enforce judicial decrees. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-457 (1932); *Sunbeam Corp.* v. *Golden Rule Appliance Co.*, 252 F.2d 467, 470, 471 (2d Cir. 1958); *Gillette Co.* v. *Two Guys From Harrison, Inc.*, 36 N.J. 342, 177 A.2d 555, 560 (1962).

The present case is closely analogous to civil contempt proceedings like *Leman* v. *Krentler-Arnold Co.*, *supra*, where compensatory damages were measured by the wrongdoer's illegal profits rather than the injured party's pecuniary loss. Although Count I of the complaint against CSI and Schrom was cast in terms of tortious interference with the consent decree, the same evidence would have supported a finding that the defendants were in contempt of court for aiding and abetting in the violation of the consent decree. *Commonwealth* v. *Town of Hudson*, 315 Mass. 335, 347 (1943); *Alves* v. *Braintree*, 341 Mass. 6, 12 (1960); *Cf.* Mass. R. Civ. P. 71. Since the wrong is the same under either theory, a similar measure of damages should apply.

Considerations of policy also support the measure of damages chosen by the trial court. There is no doubt that NAMCO was injured by CSI's interference with the decree.

NAMCO and CSI are direct competitors for advertising sales in the New England states. At least some of CSI's sales were made to former customers of NAMCO; Leyden has admitted as much (Supp. App. Petition ¶ 6 and Answer). Theoretically, perhaps, the profit on sales lost by NAMCO was a measure of NAMCO's damages. On the facts of this case, however, that measure of damages could not be employed.

In the first place, NAMCO's loss of sales is not measurable because of the nature of the telephone directory cover industry. Companies which sell advertising on telephone directory covers normally do not compete for the same customers on a day to day basis. Rather, it is customary for a company to select an entire community for distribution of a directory cover, then solicit advertisements from merchants who market their products and services in that community. When sufficient advertisements have been sold, the company prints the directory cover and mails it free of charge to all householders within the community, on the expectation that they will put the covers on their telephone directories. (App. 5, 60) Obviously, householders are unlikely to use two covers on the same directory, so the sale of a telephone directory cover "program" in a community effectively closes that community to competition until the information on the cover becomes obsolete. When CSI, in violation of the decree, sells a directory cover program in Sandwich, Massachusetts, or Windsor, Connecticut, as it did in this case (I Tr. 152; Supp. App. Petition, Answer), it can be said with certainty that those towns are closed to NAMCO for a period of months or years, even though NAMCO cannot demonstrate that it would have sold advertising to each merchant solicited by CSI within those towns.

Even if it were possible to identify sales lost by NAMCO, that procedure could not have been followed in this case because of the confidentiality protection insisted on by CSI and granted by the trial court. Because the details of CSI's telephone directory cover programs (including the names of customers and even the names of communities in which the programs were sold) could not be disclosed to NAMCO, there was no way in which NAMCO could have adduced evidence of the direct effect of CSI's activities on Namco.

Unless NAMCO receives some form of compensation for its injury, its rights under the consent decree are of little value. By inducing Stevens and others to violate the decree, CSI obtained a sales manager with extensive experience in the industry and a cadre of salesmen already familiar with the product and the territory. It took NAMCO almost 12 months to detect the violation, file suit, and obtain a preliminary injunction.[17] If the only risk in this type of conduct is the possibility of an injunction if and when the wrong is discovered, then companies such as CSI have little reason to fear the Court's decrees. Indeed, if the wrongdoer in a case like this is not ordered to disgorge his profits, there is no incentive to comply with the Court's injunction, because in that event the only sanction (if the wrongdoer is caught) is repetition of the injunction with which he has already interfered.

In cases such as this, where the injury is clear, but plaintiff's loss cannot be precisely measured, it is appropriate to invoke the equitable principle of unjust enrichment and to require the defendant to disgorge the profit derived from his wrongful conduct. *Sunbeam Corp.* v. *Golden Rule Appliance Co.*, 252 F.2d at 470; *Gillette Co.* v. *Two Guys From Harrison, Inc.*, 177 A.2d at 560; Restatement of Restitution § 1, comment e.

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[17] Schrom hired Stevens as CSI's regional sales manager in late September, 1973 (II Tr 20.124). The preliminary injunction in this case was entered on September 6, 1974 (App. 54).

IV. THE TRIAL COURT CORRECTLY ASSESSED DAMAGES AGAINST LEYDEN BASED ON THE COMMISSIONS HE EARNED IN VIOLATION OF THE CONSENT DECREE.

In his Answer to the Petition for Contempt, Leyden admitted that he had sold advertising on telephone directory covers in violation of the consent decree, that the merchants to whom he sold advertising were former customers of NAMCO, and that his activities had deprived NAMCO of the reasonable expectation of further business in the Connecticut Valley area and had injured NAMCO's goodwill in that area (Supp. App. Petition ¶ 6, Answer). Leyden claimed that he ceased his illegal activities once he was served with the Petition for Contempt (Supp. App. Answer), but CSI's records showed that Leyden continued to receive commissions through September, 1974 on sales of advertising on telephone directory covers in the proscribed area (II Tr. 46–49; Ex. 17). Leyden did not appear at trial, offered no evidence, and made no attempt to demonstrate that any portion of his commissions were attributable to sales outside the forbidden territory. The trial court therefore imposed a civil fine on Leyden in the amount of the total commissions he received from CSI, or $5,784.26 (App. 78).

Leyden now attacks the Court's award on the ground that the fine should have been measured by the pecuniary injury suffered by NAMCO as a result of his disobedience, citing *Department of Public Health* v. *Cumberland Cattle Company*, Mass. Adv. Sh. (1972) 1031 (Defendants' Brief at 12). No doubt the injury caused by Leyden's disobedience is one possible measure of damages. However, as the cases discussed in Part III, above, demonstrate, a fine based on the profits obtained in disobedience of the decree is also appropriate in civil contempt proceedings. *Leman* v. *Krentler-Arnold Co.*, *supra* at 456–457; *Sunbeam Corp.* v. *Golden Rule Appliance Co.*, *supra*; *Gillette Co.* v. *Two Guys From Harrison, Inc.*, *supra*. An award based on the wrongdoer's wrongful profits is particularly appropriate in this case, where Leyden has admitted that his illegal activities injured NAMCO's goodwill. See *Sunbeam Corp.* v. *Golden Rule Appliance Co., supra* at 470 (recovery based on unjust enrichment appropriate in cases of injury to goodwill).

Leyden also argues that a fine based on his commissions rather than NAMCO's lost sales is punitive rather than compensatory, and should not be allowed in a civil contempt proceeding (Defendants' Brief at 12). This precise contention has been raised and rejected in a number of civil contempt proceedings. *Leman* v. *Krentler-Arnold Co., supra* at 456–457; *Sunbeam Corp* v. *Golden Rule Appliance Co., supra* at 470; *Gillette Co.* v. *Two Guys From Harrison, Inc.*, 177 A.2d at 560. As the United States Supreme Court pointed out in *Leman* v. *Krentler-Arnold Co.*, courts of equity have traditionally awarded compensatory damages based on the wrongdoer's unjust enrichment. 284 U.S. at 456–457. The fine assessed against Leyden conforms to this well-established principle of equity jurisprudence and therefore should be upheld.

V. THE INJUNCTIVE RELIEF AWARDED BY THE TRIAL COURT WAS APPROPRIATE TO VINDICATE THE COURT'S DECREE AND RESTORE NAMCO TO ITS ORIGINAL POSITION.

Besides ordering defendants to disgorge their wrongful earnings, the trial court also granted NAMCO injunctive relief. CSI and Schrom were enjoined until January 1, 1976 from employing persons subject to the consent decree for the purpose of selling advertising on telephone directory covers or supervising such sales in the New England states (App. 86- 88). Leyden was enjoined until January 1, 1976 from selling advertising on telephone directory covers and from supervising such sales in the New England States (Supp. App., Judgment). All three defendants object to that portion of the judgments (Defendants' Brief at 11, 13).

CSI and Schrom rely, incorrectly, on *United Auto Supply*

Co., Inc. v. *Amaro*, 346 Mass. 625 (1964). That case held that, in a suit to enforce an agreement not to compete, the injunction should run for the period of time originally agreed upon by the parties. 346 Mass. at 628. It should be noted that the original consent decree entered on January 26, 1973 conformed to this principle. However, the action against CSI and Schrom is not a suit to enforce an agreement among the parties; it is a suit to enforce a decree of the Superior Court whose operation defendants have deliberately disrupted. Whatever may be the rule in actions to enforce private agreements, it is clear that the Superior Court has ample power to take whatever steps are necessary to enforce its own decrees. *Commonwealth* v. *Town of Hudson*, 315 Mass. 335, 346 (1943); *Nigro* v. *Conti*, 319 Mass. 480, 484 (1946); *Department of Public Health* v. *Cumberland Cattle Co., supra* at 1044.

CSI and Schrom also urge that the injunction should not have prohibited dealings with all the persons named in the consent decree because only one individual, Leyden, appeared to be in contempt of that decree (Defendants' Brief at 11). In fact, however, the record shows that George Stevens, John Rotondo, and Sanford Griff were also in contempt of the decree (II Tr. 45-46, 50-51; Exh. 17). In addition, there was evidence that CSI frequently hired former NAMCO salesmen, including some who were parties to the suit brought against CMA but were not subject to the consent decree (II Tr. 99-100, 186, 214-215). In view of the scope and flagrant nature of CSI's interference with NAMCO's rights, a broad injunction, covering all of the salesmen subject to the January 26, 1973 consent decree, was appropriate.

Finally, Leyden objects to the terms of the injunction granted against him, arguing that, "It would be more reasonable to enjoin [him] for the same number of days as his violation continued" (Defendants' Brief at 13) This argument is based on the assertion that Leyden's violation ceased sometime in June, 1974 (Defendants' Brief at 13; Supp. App. Ans.). CSI's records, however, indicated that Leyden was still being paid commissions on the sale of advertising on telephone directory covers in the proscribed area up to the date of trial in September, 1974 (II Tr. 47-49). Leyden did not appear at the trial, and offered no evidence. Under the circumstances, the trial court properly may have interpreted Leyden's absence as an attempt to foreclose inquiry into the extent of his violations of the decree. *Cf. Grady* v. *Collins Transportation Co., Inc.*, 341 Mass. 502 (1960). One who deliberately violates a decree, then leaves the Commonwealth to avoid searching scrutiny of his conduct, is in no position to haggle over the terms of the contempt order entered against him. *See Goddard* v. *Babson-Dow Mfg. Co.*, 319 Mass. 345, 350 (1946).

In the last analysis, defendants' arguments must fail because they misconceive the role of injunctive relief. The trial court's objective was not merely to nullify particular illegal acts, *see Laine* v. *Aarnio*, 265 Mass. 374, 377 (1928), but rather to accomplish the objectives of the original consent decree. To achieve these ends, the Court could "adopt all necessary, reasonable, and lawful means." *Nigro* v. *Conti, supra* at 484; *Jubinville* v. *Jubinville*, 313 Mass. 103, 108-109 (1943); *Herbits* v. *High Speed Process Printing Corp.*, 358 Mass. 817 (1971). The original consent decree entered January 26, 1973 granted a period of grace during which competition from the salesmen who had left NAMCO's employ to form CMA was enjoined. In fact, the evidence demonstrates that, for at least 12 months, a group of these same salesmen competed directly with NAMCO in the proscribed territory at the instigation of CSI and Schrom. A decree forbidding CSI from employing persons subject to the decree for a period approximately equal to the offense was an appropriate means of vindicating the consent decree and protecting NAMCO's rights. The type of "irresponsible and contumacious conduct" involved in this case compels broad remedial relief. *Dept. of Public Health* v. *Cumberland Cattle Co.*, Mass. Adv. Sh. (1972) 1031, 1044. Only by awarding money damages *and* granting injunctive relief can the Court make it not worth the risk to interfere with its decrees.

Conclusion

For the reason given above plaintiff-appellee National Merchandising Corporation urges this Court to affirm the judgment against defendants CSI and Schiora in No 74-1218 and the judgment against defendant Leyden in No 33962

Respectfully submitted,

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DEFENDANT'S

BRIEF

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT.

No. 75 - 193.

MIDDLESEX COUNTY. SITTING, 1975.

NATIONAL MERCHANDISING CORPORATION,
PLAINTIFF-APPELLEE,

v.

COMMUNITY SUBSCRIBERS, INC., ET AL.,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT.

Brief for the Appellants.

Statement of the Issues.

1. Whether the plaintiff has sustained the burden of proving that the defendants intentionally induced or pı cured a breach of the consent decree.

2. Whether the court erred by measuring damages as in an action for breach of contract.

3. Whether the court erred in enjoining the defendants from hiring or accepting any orders from the individuals

named in the consent decree for a period of time beyond the terms of that original decree.

4. Whether the expert witness, Richard Leavitt, appointed by the court, could provide by hearsay the only evidence of the gross sales of C. S. I.

5. Whether the damages and injunction levied against Edward J. Leyden for contempt of court were excessive and unreasonable.

Statement of the Case.

I. Nature of the Case.

This is an action in tort brought by the plaintiff, National Merchandising Corporation ("NAMCO"), against the defendants, Community Subscribers, Inc. ("C. S. I."), and Samuel H. Schrom ("Schrom"), by complaint dated August 26, 1974 (A. 3). It alleged that the defendants have deliberately and maliciously interfered with the rights granted to the plaintiff under a consent decree entered January 26, 1973, by inducing certain employees named in said decree to violate the provisions of an injunction contained in said decree in order for the defendants to obtain the benefits of the services of those employees (A. 6). The complaint sought damages and an order restraining the defendants from said interference (A. 6).

II. Course of Proceedings Below and Disposition.

The case was heard in Middlesex County Superior Court on September 24 and 27 and October 1 and 2, 1974, before Boudreau, J. Although the complaint contains two counts, this case was heard, and judgment entered, on count I only. Count II and the counterclaims of the defendants are to be heard at a later date. Also joined for trial was the contempt proceeding against Edward J. Leyden—equity case no. 33962, Middlesex County Superior Court (Ex. 1, Tr. I 27).

The judge issued his findings of fact and order for decree (A. 70) on October 4, 1974, in which he found, inter alia, that the defendants "intentionally interfered with the rights of NAMCO in the New England States during the proscribed period, as stated in the Consent Decree, and that said activity injured the legitimate business interests of NAMCO" (A. 75). The court assessed damages against the defendants, C. S. I. and Schrom, in the amount of $27,462 dollars and ordered the defendants to be as follows:

> "enjoined from employing or continuing to employ, whether as employees or independent contractors, any of the persons subject to the Final Decree in Equity No. 33962 for the purpose of selling or managing or supervising the sale of advertising on telephone directory covers in the New England States. . . .
>
> "It is further Ordered that the Defendants . . . are enjoined from accepting orders or contracts for advertising on telephone directory covers received from the New England States, which orders or contracts have been obtained or negotiated by said persons subject to said Final Decree of January 26, 1973" (A. 78).

The court also ordered the defendant, Edward J. Leyden, to be as follows:

> "enjoined from soliciting or selling, directly or indirectly, advertisements for telephone directory covers; from planning, supervising or managing such solicitation or sales in all of the New England States.

Said injunction shall be in effect until January 1, 1976.

"It is further ordered that the defendant Edward J. Leyden pay to NAMCO the sum of $5,784.26 as compensatory damages of violating the Consent Decree set forth in Equity No. 33962" (A. 78).

After hearing, judgment was entered on December 10, 1974, revising only the period of the injunction against the defendants. Said injunction is now to run until January 1, 1976 (A. 86-88).

The defendants filed their notice of appeal to the court's finding of fact and order of decree on October 24, 1974, and their notice of appeal to the entry of judgment on December 27, 1974 (A. 80, 89).

III. Statement of Facts.

The defendant Samuel H. Schrom, from Fairport, New York, is president, treasurer, and founder of the defendant C. S. I. The corporation, officially organized in January, 1972, has at all times been in the business of selling and manufacturing plastic telephone covers and in the manufacture and printing of various paper products (Tr. I 197-198).

The corporation retains outside salesmen who are independent contractors without employment contracts (Tr. I 219-220). Each salesman may elect his own area in which to work, and each is subject to no field supervision from the corporation. The income of the salesmen is based solely upon the percentage of the sales made. None of the salesmen are controlled by the corporation in the hours worked. They are not carried on workmens compensation or group insurance. No Social Security or federal income tax is withheld from the commission by the corporation. Commissions paid by the corporation are reported to the federal government through a federal 1099 form, not a W-2 form (Tr. II 137-140).

In November, 1972, George Stevens, Edward J. Leyden, John Rotondo, and others totalling 17 persons entered into a settlement agreement with their former employer, National Merchandising Corporation, for entry of a final consent decree enjoining the former employees from soliciting or selling advertisements for telephone directory covers; from planning, supervising, or managing such solicitation or sales; from engaging in the manufacture or distribution of telephone directory covers, either on their behalf or as an agent or employee of any person, firm, or corporation in several states, including the New England states (Exs. 2, 3, 4, Tr. I 27-28). The injunction was entered into January 26, 1973, and was to expire on September 30, 1974 (Ex. I, Tr. I 27). Mr. Samuel Schrom had no knowledge of the consent decree until May 1, 1974 (Tr. II 91-92).

In September, 1973, George Stevens and Sam Schrom met to discuss employment for C. S. I. The parties agreed that Stevens would create a new division of C. S. I., known as the Paper Products Division of New England. The purpose of this employment was to create a market for the items of paper-printed materials (Tr. I 187, II 123-126). In October, 1973, Stevens began operating the paper products division from his home in Braintree, Massachusetts, where he also operated his own business as G S S Advertising (Tr. I 29-35). The arrangement for commissions between Stevens and C. S. I. was that Stevens would be paid 5 to 10 per cent of all business that came out of New England. The commissions would be payable to Stevens as a consultant of new products (Tr. II 124). The consultant fee payable to Stevens and based upon a percentage of business was the result of an arrangement whereby Stevens would receive some monies when it was available from profits earned through sales made by all salesmen in the New England area. If Stevens would accept this arrangement, he would receive not less than $25,000 dollars per year (Tr. II 124). In November and December, 1973, Stevens hired two people as salesmen for the "Paper Products Division" (Tr. I 33).

In January, 1974, C. S. I. opened an office in Waltham, Massachusetts, which both the "Vinyl Telephone Book Cover Division" and "Paper Products Division" could use as a base of operations (Tr. I 176). Arleen Survello was in charge of the "Vinyl Telephone Book Cover Division" (Tr. I 50-51). Although both divisions used the same office, they were mutually exclusive in their operation. George Stevens conducted sales meetings at the Waltham office for the purposes of paper products only, and never engaged in, or conducted, any supervision, training, or sales meetings of the vinyl telephone book cover business (Tr. I 177). The only meeting where the vinyl telephone book cover business was discussed took place in January, 1974, in the East Rochester office of C. S. I. (Tr. II 187). In February or March, 1974, Stevens, without knowledge or consent of Schrom or any officers of C. S. I. (Tr. I 178), made sales of vinyl telephone book covers on Cape Cod amounting to $3,911 (Tr. II 50-51). Upon learning of the sale, Schrom became "extremely upset" and told Stevens that he had violated the agreement that had been made as a man-to-man agreement in October 1973 (Tr. I 179).

In April or May, 1974, Schrom first learned that the agreement entered into by Stevens and others with NAMCO was, in fact, a consent decree or court order. This knowledge was obtained by letter received from counsel for the plaintiff, dated May, 1974 (Tr. II 91). Schrom was not aware that an individual named Leyden was in his employ (Tr. II 92). The books, records, and documents available to C. S. I., reflecting all the sales made by C. S. I. salesmen in all divisions and demanded by counsel of the plaintiff and the court, were produced by Schrom. All documents were put into the possession of Richard Leavitt, a member of the accounting firm of Price-Waterhouse, who had been appointed as "Impartial Examiner" with the instructions of the court to do an audit of the sales of C. S. I. in New England from September, 1973, to September, 1974 (Tr. I 246-251). Leavitt's calculations revealed the gross sales of C. S. I. in the New England area to be $274,000 (Tr. II 29). The commissions paid to Mr. Rotondo totalled $10,339.68 (Tr. II 31); commissions paid to Mr. Leyden totalled $5,784.26 (Tr. II 48). Of all the sales made by C. S. I., the total amount paid to Stevens by C. S. I. was $30,222.65 (Tr. II 26). It was estimated that 80 per cent was attributed to vinyl telephone book covers (Tr. 209), with an approximate operating profit of 5 per cent (Tr. II 210-211; Ex. 17, Tr. II 39).

Argument.

I. The Plaintiff Is Not Entitled to Recovery against the Defendants Schrom and C. S. I. because It has Not Sustained the Burden of Proving that the Defendants Intentionally Induced or Procured a Breach of the Consent Decree.

It was incumbent upon the plaintiff to prove that the defendants intentionally and maliciously interfered with the legally protected interests of the plaintiff, and the damages sustained by that interference. *McGurk* v. *Cronenwett,* 199 Mass. 457 (1908).

There was testimony from the defendant Schrom and from the witness Stevens that Schrom had knowledge in September, 1973, of an agreement between Stevens and NAMCO (Tr. II 89-91), that Stevens was not to sell any vinyl plastic telephone book covers until October 1, 1974 (Tr. I 164). Stevens was instructed by Schrom to refrain from violating that agreement (Tr. I 178-179). Both parties, therefore, created a new division known as the "Paper Products Division" in which Stevens would work to create a new market (Tr. I 187, Tr. II 123-126). Leyden was unknown to Schrom. Although Schrom had heard that a person named Leyden was also signatory to an agreement with NAMCO not to compete, he had no knowledge that Leyden was working for C. S. I. until he received a letter from counsel for the plaintiff revealing that fact (Tr. II 92). It is submitted that although a breach of the agreement by Stevens and Leyden with NAMCO did occur on or about February and March, 1974, it was without the knowledge, consent, or direction of the defendants, Schrom or C. S. I. There was no evidence to support a finding that Schrom or C. S. I. intentionally induced or persuaded either Stevens or Leyden to breach their agreement with NAMCO.

This was the conclusion of the court below "[i]rrespective of the alleged terms of the employment [between Schrom and Stevens], to which I give no credence . . ." (A. 74). The facts, however, do not support that conclusion. Although the court is not required to believe the testimony of the defendant Schrom, or the witness Stevens, even though such testimony was uncontradicted, the court's disbelief is not the equivalent of proof of the facts to the contrary. *Maniscalco v. Director of Division of Employment Security*, 327 Mass. 211 (1951). There can be no liability from a mere knowledge of the contractual relation between other parties without any evidence of the inducement or persuasion to breach that contract. *Sweeney v. Smith,* 167 Fed. 385 (E.D. Pa. 1909). *Grammenos v. Zolotas,* 356 Mass. 594 (1970).

II. This Is an Action of Tort, and Damages Should have been Measured Accordingly; the Court Erred by Measuring Damages as in an Action for Breach of Contract.

The court computed the damages assessed in the amount of $27,462.00 against the defendants, C. S. I. and Schrom, by applying an approximation of 10 per cent net operating profits to the approximate gross sales of the defendants of $274,621.93 in the New England area (A. 77).

In the case of *H. D. Watts Co.* v. *American Bond and Mortgage Company,* 260 Mass. 599, 613 (1927), the court held that the damage recoverable for inducing a breach of contract is " 'the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy.' [Citing cases.]" In such a case, it was held, the damages assessed are not for the breach of contract, but for tort, and include such loss of profits as the plaintiff can prove resulted directly and proximately from the wrongful acts of the defendant. Further, the damages must be capable of ascertainment by reference to some definite standard, either of market value, established experience, or direct inference from known circumstances. Unless the amount of the plaintiff's loss is so established, and substantial damages were proved with reasonable certainty, there could be no recovery for "speculative or conjectural profits."

The court computed the damages against the defendants in this case by using the method of computing damages in an action for breach of contract rather than for tort. In an action for damages as a result of a violation of a covenant not to compete, the plaintiff would be entitled to prove damages in an action for breach of contract by showing a loss of profits that he would have received had the covenant been obeyed. However, even in those instances, it has been held that where there was " 'no showing that any of the fees would have been paid to . . . [the plaintiff] if . . . [the former employee] had not been in business, or what part of any particular fee represented loss profit to [the plaintiff],' " then damages have not been proved, but left to speculation. *Lufkin's Real Estate, Inc.* v. *Aseph*, 349 Mass. 343, 346 (1965). *Snelling & Snelling of Mass., Inc.* v. *Wall*, 345 Mass. 634 (1963).

Evidence of the court's error in computing damages in this case is clearly demonstrated when the court cited *Coyne Industrial Laundry of Schenectady, Inc.* v. *Gould*, 359 Mass. 269 (1971), as authority for its computation of damages (A. 77). The *Coyne Industrial Laundry* case was an action on a breach of a covenant not to compete and damages assessed for breach of contract. Therefore, the measure of damages was quite different from the measure of damages on an action of tort for intentional interference with contractual relations.

III. Judgment Enjoining the Defendants from Hiring, or Accepting Any Orders from the Individuals Named in the Consent Decree until January 1, 1976, Was Beyond the Terms of That Decree Which Restricted the Employees from Competing Until September 20, 1974.

The court, in addition to assessing damages against C. S. I. and Schrom, has enjoined C. S. I. from employing or accepting any orders of vinyl plastic telephone book covers from any of the individuals named in the consent decree of January 26, 1973. Said injunction is to continue until January 1, 1976.

It appears, from the record below, that the only individual to be in contempt of the consent decree of January 26, 1973, was Edward J. Leyden. The court has, in effect, extended the term of the injunction against each individual listed in the consent decree to January 1, 1976, without benefit of hearing or finding of contempt—save Edward J. Leyden. To restrain C. S. I. and Schrom from employing or accepting orders from these individuals is tantamount to finding these two defendants in contempt of a court order to which they were never parties.

Although the court has power to enjoin a violation of a covenant not to compete, the injunction can run only for the period of time originally agreed upon. *United Auto Supply Co., Inc.* v. *Amaro,* 346 Mass. 625 (1964). In the instant case, the period of restraint in the original consent decree was to expire on September 30, 1974. The injunction against C. S. I. from hiring or accepting the orders from the individuals named in that consent decree until January 1, 1976, goes beyond the terms of that consent decree.

IV. An Expert Witness, Richard Leavitt, Appointed by the Court as an "Impartial Examiner," Could Not Provide by Hearsay, the Only Evidence of the Gross Sales of C. S. I.

The court appointed, over objection, Richard Leavitt as an "independent examiner, in the nature of a master or auditor" (Tr. I 245). The purpose of the appointment was to prepare a summary of information from certain books and records provided by the defendants. The testimony of this witness was based solely upon the information he received from the records so provided (Tr. II 4-53). This witness, admittedly an expert in the field of accounting, testified to opinions and calculations based exclusively upon hearsay. Because the only basis of his testimony was hearsay, his testimony and his calculations (Ex. 17, Tr. II 39) should have been excluded. *State Tax Commission* v. *Assessors of Springfield,* 331 Mass. 677 (1954).

V. The Damages and Injunction Levied Against Edward J. Leyden for Contempt of Court Were Excessive and Unreasonable.

In the case of Edward J. Leyden, the court assessed $5,784.26 as compensatory damages to the plaintiff for an admitted civil contempt (A. 78). The court, in assessing the damages, used the amount of the total commissions received by Leyden from C. S. I. during the period of violation. Commissions payable to a salesman were calculated at 25 per cent of the gross sales produced. The net operating profit lost by the plaintiff, had it proved that it would have received those sales but for the violation of Leyden, would have been approximately 10 per cent of the gross sales. Accordingly, the court has assessed punitive damages against the defendant Leyden in an amount equal to 15 per cent of the gross sales he produced, or in excess of $3,524.26. Although the amount of compensatory damages levied upon one who has disobeyed a decree need not be measured with undue precision, the fine is measured in some degree by the pecuniary injury caused by the disobedience. *Department of Public Health* v. *Cumberland Cattle Company,* Mass. Adv. Sh. (1972) 1031. There was no evidence to support the conclusion that the plaintiff sustained any loss of profits as a result of the defendant Leyden's violation.

The court allowed additional remedial relief against Leyden by enjoining him from selling plastic telephone book covers until January 1, 1976 (A. 78). The violation of the consent decree occurred from February, 1974, through approximately June, 1974. It would be more reasonable to enjoin Leyden for the same number of days as his violation continued. To extend an injunction for a period of time almost equal to, but in addition to, the original injunction contained in the consent decree was unreasonable and poses an economic hardship upon the defendant.

Conclusion.

For the reasons stated in this brief, it is respectfully submitted that the judgment of the trial court against the defendants C. S. I. and Schrom should be reversed and that the damages and injunction levied against the defendant Leyden should be modified.

Respectfully submitted,

SAVINO J. BASILE,
SANTANIELLO, POSNIK & BASILE,
95 State Street,
Springfield, Massachusetts 01103.
(413) 781-2130

Ryan Mantz

From:	Ryan Mantz [rmantz@scottsutah.com]
Sent:	Monday, March 06, 2006 4:10 PM
To:	'jrbabilis@aol.com'; Kevin Bitton (kbitton@scottsutah.com); Steve Fisher (stevefisher75@hotmail.com)
Cc:	'rmantz@scottsutah.com'
Subject:	LESS Direct Mail – MORE Sales
Importance:	High

Here is a summary of how the year is going in Sales thus far.

Attached is a file illustrating by branch performance and more detail of what is discussed below.

Our Call Ahead % carrying over from last year was 50% in Utah. This means ½ of our business was in jeopardy on every round of phone calls.

- Salt Lake & Ogden had high cancel rates last year and this was no doubt a big factor
  - Salt Lake had a 53% Base Cancel Rate.
- We have dropped the New Sale Call Ahead rate to only 8% over the last 6 weeks!
- This will have a <u>**profound**</u> effect on Retention in 2006.
- This feat is truly remarkable and should not be glossed over It will revolutionize our business.

Based on reports from last year and this year's manual tracking of Inquiries we have substantially less Direct Mail Responses.

- Reports show we have received 3,783 less Inquiries year over year!
- Last year we show we received 7,097 pieces to date Vs. 3,314 this year.
- This is a 53% Drop in Mail Response.
- This has the potential to be devastating to our business.

This is an alarming number no doubt. This could mean one or a combination of several different things:

- We counted our leads incorrectly last year and didn't receive as many as we thought.
  - For the 1st bullet to be true, we would have to discount to stories about going to the post office and picking up boxes of leads last year.
- Weather has impacted our customer's desire to respond.
- Mail simply did not reach our customers
- We have already sold to the people that respond in January & February
  - As a result fewer people may respond this tie around.
- People are bored with our Mail Piece and it is time for a change.
- Real Green tracked them wrong and they never existed to the level we thought to begin with.

Sales Growth has occurred despite the dramatic drop in Mail Response.

- **As a region we have increased sales revenue 46% over last year.**
- Last year we had sold $617,000
- This year we have sold $899,950
- While Inquiries dropped 53% – sales rose 46% – This is a 99% swing in improvement!
  - Our sales team has improved immensely over last year. We could be going backwards as a business or simply staying flat with 3,700 less Inquiries.

- Take time to pat our Sales Managers on the back. They are really saving our bacon by teaching these guys how to maximize every lead.

Sales Dollars per Inquiry... This means dividing the Total Revenue Sold by the Total Inquiries Received.

- Last year we averaged $87 in sales for every Inquiry Received.
  - In other words a lot of people said "no" or did not take all of our services when they said "yes."
- This year we are averaging $271 per Inquiry Received.
  - This should not be confused with Average Value per Customer.
- **This is a 200% improvement.**
- We have been able to sell more than last year as a result of the following:
  1. 14% improvement on Average Application Price
  2. 22% of our new sales have an ICS
  3. Higher Apps Per Sale
  4. Tree & Shrub Sales
  5. 90% Grub to Sale Ratios (Almost all of our sales have grubs)

Percent to Year End Sales Revenue... **We are already half way to our Year End Sales Revenue number last year!**

- In 2005 we sold $1,884,152 ——— According to the Sales Report 1/01/05 to 12/31/05
- So far we have sold $899,950
- **This is 48% of what we did for the entire year last year and we have just begun March.**
- Last year at this time we were at 33% of our year end number.

IN SUMMARY:
While we should be very concerned about our current mail numbers, we are dominating last year's results. If we sold this years low Inquiries at last year's efficiencies, we would have sold only $288,000. Instead of dwelling on crappy response rates, we are getting it done as a team.

I want to make sure everyone is aware of the success we are having and warn us against just talking about our dire response rates compared to last year. Thank our reps and sales managers for not turning in a $228,000 and getting us to the near $900 000 mark through February!

DON'T FORGET: Attached is a file illustrating by branch performance and more detail of what is discussed below.

Thanks for reading this far!

Ryan Mantz

Attorney General v Blake (Jonathan Cape Ltd Third Party)
House of Lords
[2001] 1 AC 268

JUDGMENT-1:
LORD NICHOLLS OF BIRKENHEAD: . My Lords, George Blake is a notorious, self-confessed traitor. He was employed as a member of the security and intelligence services for 17 years, from 1944 to 1961. In 1951 he became an agent for the Soviet Union. From then until 1960 he disclosed valuable secret information and documents gained through his employment. On 3 May 1961 he pleaded guilty to five charges of unlawfully communicating information contrary to section 1(1)(c) of the Official Secrets Act 1911. He was sentenced to 42 years' imprisonment. This sentence reflected the extreme gravity of the harm brought about by his betrayal of secret information.

In 1966 Blake escaped from Wormwood Scrubs prison and fled to Berlin and then to Moscow. He is still there, a fugitive from justice. In 1989 he wrote his autobiography. Certain parts of the book related to his activities as a secret intelligence officer. By 1989 the information in the book was no longer confidential, nor was its disclosure damaging to the public interest. On 4 May 1989 Blake entered into a publishing contract with Jonathan Cape Ltd. He granted Jonathan Cape an exclusive right to publish the book in this country in return for royalties. Jonathan Cape agreed to pay him advances against royalties: oe50,000 on signing the contract, a further oe50,000 on delivery of the manuscript, and another oe50,000 on publication. Plainly, had Blake not been an infamous spy who had also dramatically escaped from prison, his autobiography would not have commanded payments of this order.

The book, entitled No Other Choice, was published on 17 September 1990. Neither the security and intelligence services nor any other branch of the Government were aware of the book until its publication was announced. Blake had not sought any prior authorisation from the Crown to disclose any of the information in the book relating to the Secret Intelligence Service. Jonathan Cape has, apparently, already paid Blake about oe60,000 under the publishing agreement. In practice that money is irrecoverable. A further substantial amount, in the region of oe90,000, remains payable. These proceedings concern this unpaid money.

The proceedings

On 24 May 1991 the Attorney General commenced an action against Blake, with a view to ensuring he should not enjoy any further financial fruits from his treachery. The writ and statement of claim sought relief on a variety of grounds. The trial took place before Sir Richard Scott V-C. Blake was not represented at the trial. He had sought unsuccessfully to have access to the further money due and owing to him by the publisher for the purpose of funding his defence. He was refused legal aid. But the court had the assistance of leading and junior counsel as amici curiae. At the trial the Crown rested its claim exclusively on one cause of action: that in writing the book and authorising its publication Blake was in breach of fiduciary duties he owed the Crown. Sir Richard Scott V-C rejected this claim and dismissed the action [1997] Ch 84. The Vice-Chancellor accepted that former members of the intelligence and security services owed a lifelong duty of non-disclosure in respect of secret and confidential information. But the law did not impose a duty which went beyond this.

The Crown appealed. Blake was not represented on the hearing of the appeal but, once again, the court had the assistance of leading and junior counsel as amici curiae. The Court of Appeal, comprising Lord Woolf MR, Millett and Mummery LJJ, allowed the appeal [1998] Ch 439. The court upheld Sir Richard Scott V-C's ruling on the breach of fiduciary claim. On this appeal to your Lordships' House the Attorney General has not sought to challenge that decision. However, the Court of Appeal permitted the Attorney General to amend his statement of claim and advance a public law claim. In making this claim the Attorney General asserted, not a private law right on behalf of the Crown, but a claim for relief in his capacity as guardian of the public interest. In this latter capacity the Attorney General may, exceptionally, invoke the assistance of the civil law in aid of the criminal law. Typically this occurs where an offence is frequently repeated in disregard of an inadequate penalty: see Gouriet v Union of Post Office Workers [1978] AC 435. In the present case Blake's disclosure of the information in his autobiography to his publishers was a breach of section 1(1) of the Official Secrets Act 1989:

"A person who is or has been ... a member of the security and intelligence services ... is guilty of an offence if without lawful authority he discloses any information ... relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services ..."

If Blake's disclosure occurred before this Act came into force on 1 March 1990, the disclosure was an offence under comparable provisions in section 2(1) of the Official Secrets Act 1911. The Court of Appeal held that the jurisdiction of the civil courts, on an application of the Attorney General, was not limited to granting an injunction restraining the commission or repeated commission of an offence. Lord Woolf MR said [1998] Ch 439, 462:

"If, as here, a criminal offence has already been committed, the jurisdiction extends to enforcing public policy with respect to the consequences of the commission of that crime, eg restraining receipt by the criminal of a further benefit as a result of or in connection with that crime ... This is an exceptional case in which the Attorney General is entitled to intervene by instituting civil proceedings, in aid of the criminal law, to uphold the public policy of ensuring that a criminal does not retain profit directly derived from the commission of his crime."

The court made an order in the following terms:

"That the defendant George Blake be restrained until further order from receiving or from authorising any person to receive on his behalf any payment or other benefit resulting from or in connection with the exploitation of No Other Choice in any form or any information therein relating to security and intelligence which is or has been in his possession by virtue of his position as a member of the Secret Intelligence Service."

Blake appealed against this decision of the Court of Appeal. On the hearing of this appeal by your Lordships he was represented by counsel and solicitors acting pro bono. I wish to pay tribute to the thoroughness with which counsel and solicitors prepared the appeal and the expertise with which Mr Clayton presented it to your Lordships.

The private law claim

In the course of his judgment [1998] Ch 439, 455-459 Lord Woolf MR made some interesting observations on a matter which had not been the subject of argument either in the Court of Appeal or before Sir Richard Scott V-C. The point arose out of the amendments made to the statement of claim in the course of the proceedings in the Court of Appeal. On 16 August 1944 Blake signed an Official Secrets Act declaration. This declaration included an undertaking:

"... I undertake not to divulge any official information gained by me as a result of my employment, either in the press or in book form. I also understand that these provisions apply not only during the period of service but also after employment has ceased."

This undertaking was contractually binding. Had Blake not signed it he would not have been employed. By submitting his manuscript for publication without first obtaining clearance Blake committed a breach of this undertaking. The Court of Appeal suggested that the Crown might have a private law claim to "restitutionary damages for breach of contract", and invited submissions on this issue. The Attorney General decided that the Crown did not wish to advance argument on this point in the Court of Appeal. The Attorney General, however, wished to keep the point open for a higher court. The Court of Appeal expressed the view, necessarily tentative in the circumstances, that the law of contract would be seriously defective if the court were unable to award restitutionary damages for breach of contract. The law is now sufficiently mature to recognise a restitutionary claim for profits made from a breach of contract in appropriate situations. These include cases of "skimped" performance, and cases where the defendant obtained his profit by doing "the very thing" he contracted not to do. The present case fell into the latter category: Blake earned his profit by doing the very thing he had promised not to do.

This matter was pursued in your Lordships' House. Prompted by an invitation from your Lordships, the Attorney General advanced an argument that restitutionary principles ought to operate to enable the Crown to recover from Blake his profits arising from his breach of contract. It will be convenient to consider this private law claim first.

This is a subject on which there is a surprising dearth of judicial decision. By way of contrast, over the last 20 years there has been no lack of academic writing. This includes valuable comment on the Court of Appeal dicta in thepresent case: by Janet O'Sullivan, "Reflections on the Role of Restitutionary Damages to protect contractual expectations" (to be published), and Catherine Mitchell, "Remedial Inadequacy in Contract and the Role of Restitutionary Damages" (1999) 15 JCL 133. Most writers have favoured the view that in some circumstances the innocent party to a breach of contract should be able to compel the defendant to disgorge the profits he obtained from his breach of contract. However, there is a noticeable absence of any consensus on what are the circumstances in which this remedy should be available. Professor Burrows has described this as a devilishly difficult topic: see "No Restitutionary Damages for Breach of Contract" [1993] LMCLQ 453. The broad proposition that a wrongdoer should not be allowed to profit from his wrong has an obvious attraction. The corollary is that the person wronged may recover the amount of this profit when he has suffered no financially measurable loss. As Glidewell LJ observed in Halifax Building Society v Thomas [1996] Ch 217, 229, the corollary is not so obviously persuasive. In these choppy waters the common law and equity steered different courses. The effects of this are still being felt.

Interference with rights of property

So I turn to established, basic principles. I shall first set the scene by noting how the court approaches the question of financial recompense for interference with rights of property. As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong: Livingstone v Rawyards Coal Co(1880) 5 AppCas 25, 39. Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user: see Whitwham v Westminster Brymbo Coal and Coke Co [1896] 2 Ch 538, and the "wayleave" cases such as Martin v Porter (1839) 5 M & W 351 and Jegon v Vivian (1871) LR 6 ChApp 742. A more recent example was the non-removal of a floating dock, in Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359.

The same principle is applied to the wrongful detention of goods. An instance is the much cited decision of the Court of Appeal in Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246, concerning portable switchboards. But the principle has a distinguished ancestry. The Earl of Halsbury LC famously asked in The Mediana [1900] AC 113, 117, that if a person took away a chair from his room and kept it for 12 months, could anybody say you had a right to diminish the damages byshowing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? To the same effect was Lord Shaw's telling example in Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson (1914) 31 RPC 104, 119. It bears repetition:

"If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.'"

Lord Shaw prefaced this observation with a statement of general principle:

"wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle ... either of price or of hire."

That was a patent infringement case. The House of Lords held that damages should be assessed on the footing of a royalty for every infringing article.

This principle is established and not controversial. More difficult is the alignment of this measure of damages within the basic compensatory measure. Recently there has been a move towards applying the label of restitution to awards of this character: see, for instance, Ministry of Defence v Ashman [1993] 2 EGLR 102, 105 and Ministry of Defence v Thompson [1993] 2 EGLR 107. However that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule.

Courts of equity went further than the common law courts. In some cases equity required the wrongdoer to yield up all his gains. In respect of certain wrongs which originally or ordinarily were the subject of proceedings in the Court of Chancery, the standard remedies were injunction and, incidental thereto, an account of profits. These wrongs included passing off, infringement of trade marks, copyrights and patents, and breach of confidence. Some of these subjects are now embodied in statutory codes. An injunction restrained the continuance of the wrong, and the wrongdoer was required to account for the profits or benefits he had obtained from breaches or infringements which had already occurred. The court always had a discretion regarding the grant of the remedy of an account of profits, and this remains the position. Further, the circumstances in which an account of profits is available under the statutes vary. For instance, an account of profits may not be ordered against a defendant in a patent infringement action who proves that at the date of the infringement he was not aware, and had no reasonable grounds for supposing, that the patent existed: Patents Act 1977, section 62(1).

In these cases the courts of equity appear to have regarded an injunction and account of profits as more appropriate remedies than damages because of the difficulty of assessing the extent of the loss. Thus, in 1803 Lord Eldon LC stated, in Hogg v Kirby, 8 Ves 215, 223, a passing off case:

"what is the consequence in law and in equity? ... a court of equity in these cases is not content with an action for damages; for it is nearly impossible to know the extent of the damage; and therefore the remedy here, though not compensating the pecuniary damage except by an account of profits, is the best: the remedy by an injunction and account."

Whether this justification for ordering an account of profits holds good factually in every case must be doubtful. Be that as it may, in these types of case equity considered that the appropriate response to the violation of the plaintiff's right was that the defendant should surrender all his gains, and that he should do so irrespective of whether the violation had caused the plaintiff any financially measurable loss. Gains were to be disgorged even though they could not be shown to correspond with any disadvantage suffered by the other party. This lack of correspondence was openly acknowledged. In Lever v Goodwin (1887) 36 ChD 1, 7, Cotton LJ stated it was "well known" that in trade mark and patent cases the plaintiff was entitled, if he succeeded in getting an injunction, to take either of two forms of relief: he might claim from the defendant either the damage he had sustained from the defendant's wrongful act or the profit made by the defendant from the defendant's wrongful act.

Considered as a matter of principle, it is difficult to see why equity required the wrongdoer to account for all his profits in these cases, whereas the common law's response was to require a wrongdoer merely to pay a reasonable fee for use of another's land or goods. In all these cases rights of property were infringed. This difference in remedial response appears to have arisen simply as an accident of history.

In some instances the common law itself afforded a wronged party a choice of remedies. A notable example is the wrong of conversion. A person whose goods were wrongfully converted by another had a choice of two remedies against the wrongdoer. He could recover damages, in respect of the loss he had sustained by the conversion. Or he could recover the proceeds of the conversion obtained by the defendant: see United Australia Ltd v Barclays Bank Ltd [1941] AC 1, 34, per Lord Romer. Historically, the latter alternative was achieved by recourse to an element of legal fiction, whereby the innocent party "waived the tort". The innocent party could suppose that the wrongful sale had been made with his consent and bring an action for money "had and received to his use": see Lamine v Dorrell (1705) 2 Ld Raym 1216, 1217. Holt CJ observed that these actions had "crept in by degrees".

Breach of trust and fiduciary duty

I should refer briefly to breach of trust and breach of fiduciary duty. Equity reinforces the duty of fidelity owed by a trustee or fiduciary by requiring him to account for any profits he derives from his office or position. This ensures that trustees and fiduciaries are financially disinterested in carrying out their duties. They may not put themselves in a position where their duty and interest conflict. To this end they must not make any unauthorised profit. If they do, they are accountable. Whether the beneficiaries or persons to whom the fiduciary duty is owed suffered any loss by the impugned transaction is altogether irrelevant. The accountability of the army sergeant in Reading v Attorney General [1951] AC 507 is a familiar application of this principle to a servant of the Crown.

Damages under Lord Cairns's Act

I must also mention the jurisdiction to award damages under section 2 of the Chancery Amendment Act 1858 (21 & 22 Vict c 27), commonly known as Lord Cairns's Act. This Act has been repealed but the jurisdiction remains. Section 2 empowered the Court of Chancery at its discretion, in all cases where it had jurisdiction to entertain an application for an injunction or specific performance, to award damages in addition to or in substitution for an injunction or specific performance. Thus section 2 enabled the Court of Chancery, sitting at Lincoln's Inn, to award damages when declining to grant equitable relief rather than, as had been the practice since Lord Eldon's decision in Todd v Gee (1810) 17 Ves 273, sending suitors across London to the common law courts at Westminster Hall.

Lord Cairns's Act had a further effect. The common law courts' jurisdiction to award damages was confined to loss or injury flowing from a cause of action which had accrued before the writ was issued. Thus in the case of a continuing wrong, such as maintaining overhanging eaves and gutters, damages were limited to the loss suffered up to the commencement of the action: see Battishill v Reed(1856) 18 CB 696. Lord Cairns's Act liberated the courts from this fetter. In future, if the court declined to grant an injunction, which had the effect in practice of sanctioning the indefinite continuance of a wrong, the court could assess damages to include losses likely to follow from the anticipated future continuance of the wrong as well as losses already suffered. The power to give damages in lieu of an injunction imported the power to give an equivalent for what was lost by the refusal of an injunction: see Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851, 859, per Viscount Finlay. It is important to note, however, that although the Act had the effect of enabling the court in this regard to award damages in respect of the future as well as the past, the Act did not alter the measure to be employed in assessing damages: see Johnson v Agnew[1980] AC 367, 400, per Lord Wilberforce. Thus, in the same way as damages at common law for violations of a property right may by measured by reference to the benefits wrongfully obtained by a defendant, so under Lord Cairns' Act damages may include damages measured by reference to the benefits likely to be obtained in future by the defendant. This approach has been adopted on many occasions. Recent examples are Bracewell v Appleby [1975] Ch 408 and Jaggard v Sawyer [1995] 1 WLR 269, both cases concerned with access to a newly-built house over another's land.

The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct. The court's refusal to grant an injunction means that in practice the defendant is thereby permitted to perpetuate the wrongful state of affairs he has brought about. But this analysis takes the matter now under discussion no further forward. A property right has value to the extent only that the court will enforce it or award damages for its infringement. The question under discussion is whether the court will award substantial damages for an infringement when no financial loss flows from the infringement and, moreover, in a suitable case will assess the damages by reference to the defendant's profit obtained from the infringement. The cases mentioned above show that the courts habitually do that very thing.

Breach of contract

Against this background I turn to consider the remedies available for breaches of contract. The basic remedy is an award of damages. In the much quoted words of Baron Parke, the rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position as if the contract had been performed: Robinson v Harman (1848) 1 Exch 850, 855. Leaving aside the anomalous exception of punitive damages, damages are compensatory. That is axiomatic. It is equally well established that an award of damages, assessed by reference to financial loss, is not always "adequate" as a remedy for a breach of contract. The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages, assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate.

The classic example of this type of case, as every law student knows, is a contract for the sale of land. The buyer of a house may be attracted by features which have little or no impact on the value of the house. An award of damages, based on strictly financial criteria, would fail to recompense a disappointed buyer for this head of loss. The primary response of the law to this type of case is to ensure, if possible, that the contract is performed in accordance with its terms. The court may make orders compelling the party who has committed a breach of contract, or is threatening to do so, to carry out his contractual obligations. To this end the court has wide powers to grant injunctive relief. The court will, for instance, readily make orders for the specific performance of contracts for the sale of land, and sometimes it will do so in respect of contracts for the sale of goods. In Beswick v Beswick [1968] AC 58 the court made an order for the specific performance of a contract to make payments of money to a third party. The law recognised that the innocent party to the breach of contract had a legitimate interest in having the contract performed even though he himself would suffer no financial loss from its breach. Likewise, the court will compel the observance of negative obligations by granting injunctions. This may include a mandatory order to undo an existing breach, as where the court orders the defendant to pull down building works carried out in breach of covenant.

All this is trite law. In practice, these specific remedies go a long way towards providing suitable protection for innocent parties who will suffer loss from breaches of contract which are not adequately remediable by an award of damages. But these remedies are not always available. For instance, confidential information may be published in breach of a non-disclosure agreement before the innocent party has time to apply to the court for urgent relief. Then the breach is irreversible. Further, these specific remedies are discretionary. Contractual obligations vary infinitely. So do the circumstances in which breaches occur, and the circumstances in which remedies are sought. The court may, for instance, decline to grant specific relief on the ground that this would be oppressive.

An instance of this nature occurred in Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798. For social and economic reasons the court refused to make a mandatory order for the demolition of housesbuilt on land burdened with a restrictive covenant. Instead, Brightman J made an award of damages under the jurisdiction which originated with Lord Cairns's Act. The existence of the new houses did not diminish the value of the benefited land by one farthing. The judge considered that if the plaintiffs were given a nominal sum, or no sum, justice would manifestly not have been done. He assessed the damages at 5% of the developer's anticipated profit, this being the amount of money which could reasonably have been demanded for a relaxation of the covenant.

In reaching his conclusion the judge applied by analogy the cases mentioned above concerning the assessment of damages when a defendant has invaded another's property rights but without diminishing the value of the property. I consider he was right to do so. Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons. However, it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights. As Lionel D Smith has pointed out in his article "Disgorgement of the profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995) 24 Can BLJ 121, it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights.

I turn to the decision of the Court of Appeal in Surrey County Council v Bredero Homes Ltd [1993] 1 WLR 1361. A local authority had sold surplus land to a developer and obtained a covenant that the developer would develop the land in accordance with an existing planning permission. The sole purpose of the local authority in imposing the covenant was to enable it to share in the planning gain if, as happened, planning permission was subsequently granted for the erection of a larger number of houses. The purpose was that the developer would have to apply and pay for a relaxation of the covenant if it wanted to build more houses. In breach of covenant the developer completed the development in accordance with the later planning permission, and the local authority brought a claim for damages. The erection of the larger number of houses had not caused any financial loss to the local authority. The judge awarded nominal damages of oe2, and the Court of Appeal dismissed the local authority's appeal.

This is a difficult decision. It has attracted criticism from academic commentators and also in judgments of Sir Thomas Bingham MR and Millett LJ in Jaggard v Sawyer [1995] 1 WLR 269. I need not pursue the detailed criticisms. In the Bredero case Dillon LJ himself noted, at p 1364, that had the covenant been worded differently, there could have been provision for payment of an increased price if a further planning permission were forthcoming. That would have been enforceable. But, according to the Brederodecision, a covenant not to erect any further houses without permission, intended to achieve the same result, may be breached with impunity. That would be a sorry reflection on the law. Suffice to say, in so far as the Bredero decision is inconsistent with the approach adopted in the Wrotham Park case, the latter approach is to be preferred.

The Wrotham Park case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by thewrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained. In the present case the Crown seeks to go further. The claim is for all the profits of Blake's book which the publisher has not yet paid him. This raises the question whether an account of profits can ever be given as a remedy for breach of contract. The researches of counsel have been unable to discover any case where the court has made such an order on a claim for breach of contract. In Tito v Waddell (No 2) [1977] Ch 106, 332, a decision which has proved controversial, Sir Robert Megarry V-C said that, as a matter of fundamental principle, the question of damages was "not one of making the defendant disgorge" his gains, in that case what he had saved by committing the wrong, but "one of compensating the plaintiff". In Occidental Worldwide Investment Corporation v Skibs A/S Avanti [1976] 1 Lloyd's Rep 293, 337, Kerr J summarily rejected a claim for an account of profits when ship owners withdrew ships on a rising market.

There is a light sprinkling of cases where courts have made orders having the same effect as an order for an account of profits, but the courts seem always to have attached a different label. A person who, in breach of contract, sells land twice over must surrender his profits on the second sale to the original buyer. Since courts regularly make orders for the specific performance of contracts for the sale of land, a seller of land is, to an extent, regarded as holding the land on trust for the buyer: Lake v Bayliss [1974] 1 WLR 1073. In Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd[1912] AC 555 a railway company agreed not to transmit any commercial messages over a particular telegraph wire except for the benefit and account of the telegraph company. The Privy Council held that the railway company was liable to account as a trustee for the profits it wrongfully made from its use of the wire for commercial purposes. In British Motor Trade Association v Gilbert [1951] 2 All ER 641 the plaintiff suffered no financial loss but the award of damages for breach of contract effectively stripped the wrongdoer of the profit he had made from his wrongful venture into the black market for new cars.

These cases illustrate that circumstances do arise when the just response to a breach of contract is that the wrongdoer should not be permitted to retain any profit from the breach. In these cases the courts have reached the desired result by straining existing concepts. Professor Peter Birks has deplored the "failure of jurisprudence when the law is forced into this kind of abusive instrumentalism"; see "Profits of Breach of Contract" (1993) 109 LQR 518, 520. Some years ago Professor Dawson suggested there is no inherent reason why the technique of equity courts in land contracts should not be more widely employed, not by granting remedies as the by-product of a phantom "trust" created by the contract, but as an alternative form of money judgment remedy. That well known ailment of lawyers, a hardening of the categories, ought not to be an obstacle: see "Restitution or Damages" (1959) 20 Ohio SLJ 175.

My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression "restitutionary damages". Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionaryremedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

The state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible.

The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

It would be difficult, and unwise, to attempt to be more specific. In the Court of Appeal [1998] Ch 439 Lord Woolf MR suggested there are at leasttwo situations in which justice requires the award of restitutionary damages where compensatory damages would be inadequate: see p 458. Lord Woolf MR was not there addressing the question of when an account of profits, in the conventional sense, should be available. But I should add that, so far as an account of profits is concerned, the suggested categorisation would not assist. The first suggested category was the case of "skimped" performance, where the defendant fails to provide the full extent of services he has contracted to provide. He should be liable to pay back the amount of expenditure he saved by the breach. This is a much discussed problem. But a part refund of the price agreed for services would not fall within the scope of an account of profits as ordinarily understood. Nor does an account of profits seem to be needed in this context. The resolution of the problem of cases of skimped performance, where the plaintiff does not get what was agreed, may best be found elsewhere. If a shopkeeper supplies inferior and cheaper goods than those ordered and paid for, he has to refund the difference in price. That would be the outcome of a claim for damages for breach of contract. That would be so, irrespective of whether the goods in fact served the intended purpose. There must be scope for a similar approach, without any straining of principle, in cases where the defendant provided inferior and cheaper services than those contracted for.

The second suggested category was where the defendant has obtained his profit by doing the very thing he contracted not to do. This category is defined too widely to assist. The category is apt to embrace all express negative obligations. But something more is required than mere breach of such an obligation before an account of profits will be the appropriate remedy.

Lord Woolf MR [1998] Ch 439, 457, 458, also suggested three facts which should not be a sufficient ground for departing from the normal basis on which damages are awarded: the fact that the breach was cynical and deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the defendant put it out of his power to perform his contract with the plaintiff. I agree that none of these facts would be, by itself, a good reason for ordering an account of profits.

The present case

The present case is exceptional. The context is employment as a member of the security and intelligence services. Secret information is the lifeblood of these services. In the 1950s Blake deliberately committed repeated breaches of his undertaking not to divulge official information gained as a result of his employment. He caused untold and immeasurable damage to the public interest he had committed himself to serve. In 1990 he published his autobiography, a further breach of his express undertaking. By this time the information disclosed was no longer confidential. In the ordinary course of commercial dealings the disclosure of non-confidential information might be regarded as venial. In the present case disclosure was also a criminal offence under the Official Secrets Acts, even though the information was no longer confidential. Section 1 of the Official Secrets Act 1989 draws a distinction in this regard between members of the security and intelligence services and other Crown servants. Under section 1(3) a person who is or has been a Crown servant is guilty of an offence if without lawful authorityhe makes "a damaging disclosure" of information relating to security or intelligence. The offence is drawn more widely in the case of a present or past member of the security and intelligence services. Such a person is guilty of an offence if without lawful authority he discloses "any information" relating to security or intelligence which is or has been in his possession by virtue of his position as a member of those services. This distinction was approved in Parliament after debate when the legislation was being enacted.

Mr Clayton submitted that section 1(1) is drawn too widely and infringes article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). Section 1(1) criminalises disclosure of information when no damage results. It focuses on the status of the individual who makes the disclosure, rather than on the nature of the information itself. A non-damaging disclosure by a member of the security and intelligence services is criminal, but the identical non-damaging disclosure by a Crown servant is not.

This argument was raised for the first time in this House. Your Lordships are not equipped with the material necessary to decide the point. In the event this does not matter, because there is in the present case another consideration which is sufficient for the purposes of the Attorney General. When he joined the Secret Intelligence Service Blake expressly agreed in writing that he would not disclose official information, during or after his service, in book form or otherwise. He was employed on that basis. That was the basis on which he acquired official information. The Crown had and has a legitimate interest in preventing Blake profiting from the disclosure of official information, whether classified or not, while a member of the service and thereafter. Neither he, nor any other member of the service, should have a financial incentive to break his undertaking. It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and dangerous operations, would jeopardise the effectiveness of the service. An absolute rule against disclosure, visible to all, makes good sense.

In considering what would be a just response to a breach of Blake's undertaking the court has to take these considerations into account. The undertaking, if not a fiduciary obligation, was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of breach. Had the information which Blake has now disclosed still been confidential, an account of profits would have been ordered, almost as a matter of course. In the special circumstances of the intelligence services, the same conclusion should follow even though the information is no longer confidential. That would be a just response to the breach. I am reinforced in this view by noting that most of the profits from the book derive indirectly from the extremely serious and damaging breaches of the same undertaking committed by Blake in the 1950s. As already mentioned, but for his notoriety as an infamous spy his autobiography would not have commanded royalties of the magnitude Jonathan Cape agreed to pay.

As a footnote I observe that a similar conclusion, requiring the contract breaker to disgorge his profits, was reached in the majority decision of the United States Supreme Court in Snepp v United States (1980) 444 US 507.The facts were strikingly similar. A former employee of the Central Intelligence Agency, whose conditions of employment included a promise not to divulge any information relating to the agency without prepublication clearance, published a book about the agency's activities in Vietnam. None of the information was classified, but an agent's violation of his non-disclosure obligation impaired the agency's ability to function properly. The court considered and rejected various forms of relief. The actual damage was not quantifiable, nominal damages were a hollow alternative, and punitive damages after a jury trial would be speculative and unusual. Even if recovered they would bear no relation to either the government's irreparable loss or Snepp's unjust gain. The court considered that a remedy which required Snepp "to disgorge the benefits of his faithlessness", was swift and sure, tailored to deter those who would place sensitive information at risk and, since the remedy reached only funds attributable to the breach, it could not saddle the former agent with exemplary damages out of all proportion to his gain. In order to achieve this result the court "imposed" a constructive trust on Snepp's profits. In this country, affording the plaintiff the remedy of an account of profits is a different means to the same end.

The form of the order

The Attorney General's entitlement to an account of Blake's profits does not, in this case, confer on the Crown any proprietary interest in the debt due to Blake from Jonathan Cape. The Crown is entitled, on the taking of the account, to a money judgment which can then be enforced by attachment of the debt in the usual way. These formal steps may be capable of being short-circuited. Despite the niceties and formalities once associated with taking an account, the amount payable under an account of profits need not be any more elaborately or precisely calculated than damages. But in this case there is a complication. Blake has brought third party proceedings against Jonathan Cape, seeking payment of oe90,000 (less tax). In the third party proceedings Jonathan Cape has sought to deduct legal expenses incurred in resisting a defamation claim and in resisting the Crown's claim. Accordingly, the appropriate form of order on this appeal is a declaration that the Attorney General is entitled to be paid a sum equal to whatever amount is due and owing to Blake from Jonathan Cape under the publishing agreement of 4

May 1989. The injunction granted by the Court of Appeal will remain in force until Jonathan Cape duly makes payment to the Attorney General. I would dismiss this appeal.

The public law claim

The public law claim, advanced by the Attorney General as guardian of the public interest, arises only if the Crown as Blake's former employer has no private law claim in respect of the royalties. Accordingly, having regard to the conclusion already reached on the private law claim, the public law claim does not call for decision. However, it is right that I should state briefly why I cannot agree with the decision of the Court of Appeal on this point, much as I sympathise with the court's objective. The public law claim is founded on the premise that the royalties belong to Blake. The order made by the Court of Appeal was not intended to be confiscatory. It was not intended to extinguish Blake's title. The Solicitor General stated explicitlythat the order was intended only to be preservative: a "freezing" order. Indeed, the order is so drafted. Blake is merely restrained from receiving payment of the royalties "until further order". This is the classic form of order that seeks to preserve property pending the happening of some other event. Typically, the event is a decision by the court on who is entitled to the property. Lord Woolf MR said that the injunction in the present case would serve the ordinary purpose of preserving assets pending adjudication.

This form of order prompts the question: in the absence of a private law claim, what is the event pending which the money held by Jonathan Cape is being frozen in its hands? What is the anticipated adjudication? If Blake were to return to this country he could be prosecuted for a breach of section 1(1) of the Official Secrets Act 1989. When criminal proceedings were launched, the court would have statutory jurisdiction to make a restraint order to prevent the proceeds of a criminal offence being used or dissipated. If convicted, the Crown could seek a confiscation order under Part VI of the Criminal Justice Act 1988, as amended by the Proceeds of Crime Act 1995. But none of this is a realistic possibility. The Solicitor General openly accepted that this is so. There is no prospect of Blake returning to this country. Thus, the money is not being preserved pending a criminal prosecution.

This being the case, one must look elsewhere for the event which will decide what is to happen to the money thus frozen in Jonathan Cape's hands. I have to say that one seeks in vain for any satisfactory explanation of what that event will be. The Crown suggested that at some stage in the future an application might be made to the court for the money to be released to a charity, or used in some other way which would not benefit Blake. The Court of Appeal envisaged the possibility of some use for the unpaid royalties which would not be "contrary to the public interest". But these suggestions serve only to underline that, although not so expressed, the effect of this order is confiscatory. The order will have the effect of preventing the money being paid to Blake. It is not envisaged that the money will ever be paid to him. He is being deprived of the use of the money indefinitely. That is the intention. Although the order is strictly only interlocutory in character ("until further order"), the basis on which the court has made the order is that Blake will never receive any of the unpaid royalties. That is confiscation in substance, if not in form. In my view the court has no power to make such an order. In respect of the proceeds of crime Parliament has conferred upon the court power to make confiscation orders and ancillary restraint orders. In Part VI of the Criminal Justice Act 1988, since amended by the Proceeds of Crime Act 1995, Parliament has carefully marked out when these orders may be made. The common law has no power to remedy any perceived deficiencies in this statutory code. An attempt to do so would offend the established general principle, of high constitutional importance, that there is no common law power to take or confiscate property without compensation: see Attorney General v De Keyser's Royal Hotel, Ltd[1920] AC 508, Burmah Oil Co Ltd v Lord Advocate[1965] AC 75 and, in this context, Malone v Metropolitan Police Comr [1980] QB 49, 61-63, per Stephenson LJ.

I should add that in his judgment Lord Woolf MR [1998] Ch 439, 463, referred to several cases where interlocutory injunctions were granted to chief constables freezing the suspected proceeds of crime in circumstanceswhere there had not yet been a conviction for a criminal offence. In this House Mr Clayton mounted a sustained attack on these decisions. For his part the Solicitor General did not seek to rely on these decisions in support of the Attorney General's case. As Lord Woolf MR noted, the Attorney General stands in an altogether different legal and constitutional position. Since the House has not heard contrary argument, it would not be right to express any views on Mr Clayton's submissions regarding these cases.

JUDGMENTBY-2: LORD GOFF OF CHIEVELEY

JUDGMENT-2:
LORD GOFF OF CHIEVELEY: . My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Nicholls of Birkenhead. I agree with it and for the reasons which he has given I would dismiss this appeal.

JUDGMENTBY-3: LORD BROWNE-WILKINSON

JUDGMENT-3:
LORD BROWNE-WILKINSON: . My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Nicholls of Birkenhead. I agree with it and for the reasons which he gives I would dismiss this appeal but vary the order of the Court of Appeal to declare that the Attorney General is entitled to be paid a sum equal to whatever amount is due and owing to Blake from Jonathan Cape under the publishing agreement of 4 May 1989.

JUDGMENTBY-4: LORD STEYN

JUDGMENT-4:
LORD STEYN: . My Lords, in law classification is important. Asking the right questions in the right order reduces the risk of wrong decisions. This truth is illustrated by the case before the House. Blake is a convicted traitor. From 1944 to 1961 he was a member of the intelligence services. In 1944 he was required to and did sign a contractual undertaking "not to divulge any official information gained by me as a result of my employment, either in the press or book form". This undertaking still binds Blake. In flagrant breach of the terms of the undertaking Blake published a book in September 1990 dealing in part with his period in the intelligence services. This appeal concerns a sum of about oe90,000 payable by Jonathan Cape Ltd, the publishers, to Blake. The Court of Appeal upheld the decision of Sir Richard Scott V-C, that Blake is not liable to account for his profits as a fiduciary: Attorney General v Blake [1998] Ch 439. Despite the encouragement of the Court of Appeal Mr John Smith QC, the Attorney General at that time, declined to pursue a claim for restitutionary damages for breach of contract. While recording its view that such a claim, if made, might be sound, the Court of Appeal was powerless to act on that view: at pp 456-458. In a case crying out for effective relief against Blake, the Court of Appeal devised an injunction, the objective of which was to prevent the money reaching Blake. Due to an initiative taken by the House, the issue of the availability of a restitutionary remedy is now before the House. At the hearing of the appeal counsel for Blake addressed first the public law question whether the Court of Appeal had the power to grant the injunction before he dealt with the question whether a restitutionary remedy is available. My Lords, taxonomy requires that the question whether there is such a private law remedy should be considered first. This is so because the Court of Appeal in granting the injunction undoubtedly extended the reach of existing powers of the Attorney General. And that course could only sensibly be entertained if there was not a restitutionary law remedy. It is therefore to the private law position that I first turn.

In the Court of Appeal in Surrey County Council v Bredero Homes Ltd [1993] 1 WLR 1361 I discussed some of the difficulties inherent in creating a general remedy for the recovery of restitutionary damages for breach of contract. On that occasion I remarked that it is not traditional to describe a claim for restitution following a breach of contract as damages. The terminology is however less important than the substance: under consideration are claims for the disgorgement of profits against a contract breaker. There has been a substantial academic debate on the merits of the actual decision in the Bredero case. Since this issue has not been directly debated in the present case I propose to express no view on it. But it is right to acknowledge that the academic comment has been critical of the decision in the Bredero case I would, however, respectfully offer a comment on the valuable academic debate. On the one hand, there is no or virtually no support for a general action for disgorgement of profits made by a contract breaker by reason of his breach. On the other hand, there is significantly absent from the post-Bredero academic comment a reasoned statement of the particular circumstances when such a remedy should be available. That is not surprising because it is a notoriously a difficult subject. But the Court of Appeal has been bold. It is said that the remedy should be available in two situations, viz (1) in cases of "skimped" performance (where the "gain" would take the form of expense saved) and (2) "where the defendant has obtained his profit by doing the very thing which he contracted not to do". The second would cover the present case. But it potentially has wide application. Sir Guenter Treitel QC in The Law of Contract, 10th ed (1999), pp 868-869, has questioned the soundness of the observations of the Court of Appeal: see also the valuable comment by Janet O'Sullivan, "Reflections on the role of restitutionary damages to protect contractual expectations" (to be published) and Hanoch Dagan, "Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory" [2000] 1 Theoretical Inquiries in Law 115. I am not at present willing to endorse the broad observations of the Court of Appeal. Exceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases.

In the hearing before the House Mr Ross Cranston, the Solicitor General, in a thoughtful and careful speech argued for a recognition of an action for disgorgement of profits against a contract breaker where four conditions are fulfilled. (1) There has been a breach of a negative stipulation. (2) The contract breaker has obtained the profit by doing the very thing which he promised not to do. (3) The innocent party (in this case the Crown as represented by the Attorney General) has a special interest over and above the hope of a benefit to be assessed in monetary terms. (4) Specific performance or an injunction is an ineffective or virtually ineffective remedy for the breach. The Solicitor General persuaded me that in the case of Blake each of these conditions is satisfied. But since I recognise that it would be wrong to create a remedy simply to cover this case, it is right that I should explain the specific considerations which lead me to conclude that it is right on a principled basis to develop the law in a way which covers this case and other cases sharing materially similar features.

My Lords, it has been held at first instance and in the Court of Appeal that Blake is not a fiduciary. This is not an issue before the House. But, as my noble and learned friend, Lord Nicholls of Birkenhead, has observed, thepresent case is closely analogous to that of fiduciaries: compare Reading v Attorney General [1951] AC 507. If the information was still confidential, Blake would in my view have been liable as a fiduciary. That would be so despite the fact that he left the intelligence services many years ago. The distinctive feature of this case is, however, that Blake gave an undertaking not to divulge any information, confidential or otherwise, obtained by him during his work in the intelligence services. This obligation still applies to Blake. He was, therefore in regard to all information obtained by him in the intelligence services, confidential or not, in a very similar position to a fiduciary. The reason of the rule applying to fiduciaries applies to him. Secondly, I bear in mind that the enduring strength of the common law is that it has been developed on a case-by-case basis by judges for whom the attainment of practical justice was a major objective of their work. It is still one of the major moulding forces of judicial decision-making. These observations are almost banal: the public would be astonished if it was thought that judges did not conceive it as their prime duty to do practical justice whenever possible. A recent example of this process at work is White v Jones [1995] 2 AC 207 where by a majority the House of Lords held that a solicitor who caused loss to a third party by negligence in the preparation of a will is liable in damages. Subordinating conceptual difficulties to the needs of practical justice a majority, and notably Lord Goff of Chieveley, at pp 259-260, upheld the claim. For my part practical justice strongly militates in favour of granting an order for disgorgement of profits against Blake. The decision of the United States Supreme Court in Snepp v United States, 444 US 507 is instructive. On very similar facts the Supreme Court imposed a constructive trust on the intelligence officer's profits. Our law is also mature enough to provide a remedy in such a case but does so by the route of the exceptional recognition of a claim for disgorgement of profits against the contract breaker. In my view therefore there is a valid claim vesting in the Attorney General against Blake for disgorgement of his gain.

In view of these conclusions the judgment of the Court of Appeal on the granting of the injunction may appear to be less important. But in a persuasive speech counsel for Blake has persuaded me that the judgment of the Court of Appeal on this aspect cannot stand. First, in granting the injunction to prevent Blake from receiving his royalties the Court of Appeal went significantly beyond the existing law governing the powers of the Attorney General. Secondly, in this case it was unnecessary to do so because the Attorney General in truth had a perfectly good private law remedy which he chose not to invoke. Giving to a member of the executive unnecessary powers is never a good idea. One does not know how such powers may be employed in future. Thirdly, the decision of the Court of Appeal is, in any event, an order with confiscatory effect. Parliament has legislated for the circumstances in which the profits of crime may be confiscated. An indispensable statutory requirement is a conviction for the relevant offence: see Webb v Chief Constable of Merseyside Police [2000] QB 427. In this case the only relevant offence could be the handing over by Blake of the manuscript to the publishers. He has not been convicted of that offence. Given the limitations upon the power to confiscate carefully laid down by Parliament it is a very strong thing for a court to create a power to confiscate directly or indirectly the proceeds of crime. After all, theconstitutional function of the courts in creating law does not go beyond filling spaces left vacant by Parliament. Lastly, it has been a longstanding principle of the common law that, absent legislative authorisation, a court may not confiscate the property of a citizen: see Malone v Comr of Police of the Metropolis [1980] QB 49; Webb v Chief Constable of Merseyside Police [2000] QB 427, per May LJ, at pp 446-448, per Pill LJ, at p 449. This principle must also apply to a court granting an injunction designed to have a confiscatory effect.

My Lords, for these reasons, as well as the detailed and far more compelling reasons given by Lord Nicholls of Birkenhead, I would make the order which he has proposed.

JUDGMENTBY-5: LORD HOBHOUSE OF WOODBOROUGH

JUDGMENT-5:
LORD HOBHOUSE OF WOODBOROUGH: . My Lords, when he opened this appeal, Mr Clayton, to whose pro bono services on behalf of the appellant George Blake I, too, would wish to pay tribute, warned your Lordships against being drawn into making bad law in order to enable an intuitively just decision to be given against a traitor. It is therefore particularly important to be clear what are the facts which have given rise to the Attorney General's claim in the present case. They are not materially in dispute.

Between 1944 and 1961, Blake was employed by the Crown as a member of the Secret Intelligence Service. As such he was subject to the provisions of the Official Secrets Act 1911. In August 1944 he signed the requisite declaration under the Act. The declaration which he signed included the added sentence:

"I understand that the above clauses [2 and 3] of the Official Secrets Act 1911 and 1920 cover also articles published in the press and in book form and I undertake not to divulge any official information gained by me as a result of my employment either in the press or in book form."

It is common ground in the present case that these words amounted to a contractual undertaking by Blake in favour of the Crown and that the Crown had a legitimate interest in asking for this undertaking in aid of the criminal provisions quoted earlier in the document. It was not a commercial document and its purpose was not to protect any commercial interest of the Crown or any right of the Crown commercially to exploit such information. Its purpose and justification was to support and reinforce the provisions of the criminal law to which Blake became subject by reason of his entering the employment of the Crown and signing the statutory declaration. It is that justification which prevented the undertaking from amounting to an unlawful restraint of trade and would now have to be relied upon to justify the infringement of his freedom to impart information.

Blake had no regard for his duty of loyalty to his country and the Crown nor to his obligation to observe the criminal law. Between 1951 and 1960, he disclosed valuable secrets to foreign agents. He was later found out and in 1961 he was, on his own plea, convicted of five offences under the 1911 Act and sentenced to 42 years' imprisonment. He escaped in 1966 and fled to Moscow.

In 1989, 28 years after his conviction, Blake entered into an agreement with Jonathan Cape Ltd, an English company, to publish a book to be written by him about his life from 1944 onwards. He delivered themanuscript by the end of that year and the book was published in September 1990.

The Government however did not take any action against the publishers Jonathan Cape even though the Government knew of the existence of the book before it was published. Neither Blake nor anyone else had sought the Government's permission for the publication. It is accepted that, by delivering the manuscript to Jonathan Cape, Blake committed an offence under the 1911 Act (or its successor, the 1989 Act) and broke the contractual undertaking which he had given in 1944. It is also accepted that in 1989 and 1990, had it chosen to do so, the Crown could have applied for an injunction to restrain the publication of the book and would probably have been successful. Had the court decided in its discretion not to grant an injunction at that time, one or more of the remedies alternative to an injunction could have been considered and, if thought appropriate, adopted. The present litigation has only come about because the Crown chose not to take that course at that time.

The reason why in May 1991 these proceedings were started was because the Crown had learnt of the size of the advance royalty which Jonathan Cape had agreed to pay Blake. It was about oe150,000. The size of this royalty was accounted for not by any new facts contained in the book. The contents of the book were, as summarised in the agreed statement of facts, fairly unremarkable. Parts did relate to his activities as a secret service officer but by 1989 none of the information was any longer confidential nor was it alleged that it would damage the public interest. The size of the royalty was attributable to his notoriety as an infamous spy. The Crown thought that it was wrong that he should be allowed to enjoy the substantial sum which resulted from the publication of the book. Blake had escaped his just punishment for his crimes. There was no prospect of ever bringing him back into the jurisdiction and make him serve out his prison sentence. Now that he had an asset within the jurisdiction, that at least should be withheld from him; the asset had a connection with the crimes which he had committed.

The remarkable history of the proceedings thereafter has been already described by my noble and learned friend, Lord Nicholls of Birkenhead. The claim to the royalties was originally made on recognised proprietary and fiduciary principles. If applicable they would have given the Crown the private law remedy they sought, an order for the taking of an account and the payment over of the sums found due. But this claim could not be sustained on the facts. Too much time had elapsed since 1960. There was no longer anything which was confidential or which would damage the public interest; he no longer had any fiduciary relationship to the Crown. Sir Richard Scott V-C dismissed the action. The

Crown appealed. Its appeal failed but before it was dismissed a new line was adopted with the encouragement of the court and leave to amend was given.

The public law claim was made. This relied upon the role of the Attorney General as an officer of the Crown responsible for assisting in upholding the criminal law. In this capacity it is open to him to apply for an injunction. He sought, and after a further hearing the court granted him, an interim injunction to restrain the payment of the remaining royalty money (about oe90,000) to Blake. However, perhaps conscious that this order might be open to criticism, the court in its judgment tentatively raised a further possibility-restitutionary damages.

Blake has now appealed to your Lordships' House against the grant of the injunction. Like all of your Lordships, I agree that the grant of the injunction was wrong and should be set aside. But the Crown has, with your Lordships' encouragement and leave, cross-appealed to make the private law claim to restitutionary damages which it had previously declined to make. Your Lordships have concluded that this claim should be allowed.

I cannot join your Lordships in that conclusion. I have two primary difficulties. The first is the facts of the present case. The speech of my noble and learned friend explores what is the "just response" to the defendant's conduct. The "just response" visualised in the present case is, however it is formulated, that Blake should be punished and deprived of any fruits of conduct connected with his former criminal and reprehensible conduct. The Crown have made no secret of this. It is not a commercial claim in support of any commercial interest. It is a claim relating to past criminal conduct. The way it was put by the Court of Appeal [1998] Ch 439, 464 was:

"The ordinary member of the public would be shocked if the position was that the courts were powerless to prevent [Blake] profiting from his criminal conduct."

The answer given by my noble and learned friend does not reflect the essentially punitive nature of the claim and seeks to apply principles of law which are only appropriate where commercial or proprietary interests are involved. Blake has made a financial gain but he has not done so at the expense of the Crown or making use of any property of or commercial interest of the Crown either in law or equity.

My second difficulty is that the reasoning of my noble and learned friend depends upon the conclusion that there is some gap in the existing state of the law which requires to be filled by a new remedy. He accepts that the term "restitutionary damages" is unsatisfactory but, with respect, does not fully examine why this is so, drawing the necessary conclusions.

The cross-appeal has to be determined on the basis that the only civil cause of action which the Crown has against Blake is a bare legal cause of action in contract for breach of contract in that he failed in 1989 to observe the negative undertaking which he gave in 1944. As already observed, it is recognised by Blake that the Crown had at the least a good arguable case for the grant of an injunction against him at that time. In other words it was a breach of contract-breach of a negative undertaking-liable to be restrained by injunction, ie, specifically enforced.

But the Crown did not apply for an injunction at the time it would have done some good and quite probably stopped the publication of the book. This is the source of the problems for the Crown in achieving its purpose in bringing these proceedings. It cannot say that it intends to prosecute Blake because it does not expect that he will ever return to this country; consequently it admits that it cannot say that it will ever be in a position to make use of the provisions of the Criminal Justice Act 1988 and the Proceeds of Crime Act 1995. It does not say that the payment of the oe90,000 by Jonathan Cape to Blake would amount to the commission of any criminal offence by either Jonathan Cape or Blake. It accepts that it has no direct right of recourse against Jonathan Cape; it is confined to claiming some public law or private law remedy against Blake. It now accepts that its original claim that it has equitable or fiduciary or proprietary rights againstBlake cannot be sustained. It cannot claim compensatory damages for breach of contract because it has suffered no loss as a result of the publication.

What then was left? First there was the public law claim to an interim injunction as awarded by the Court of Appeal. Second there now is the claim not made as such in the Court of Appeal but now fully argued in your Lordships' House as a cross-appeal by the Crown for restitutionary damages.

The public law claim

I agree that the decision of the Court of Appeal cannot be sustained. I agree with the reasoning of my noble and learned friends save in so far as it seeks to pray in aid their conclusion on the cross-appeal. The injunction was granted in aid of preserving a power later to confiscate the relevant sum of money. The Attorney General has the locus standi to make such an application. He did not seek to rely on Chief Constable of Kent v V [1983] QB 34 and there has been no need to consider that case. The reason why the grant of the injunction cannot be sustained is that there is no common law power to confiscate as such the earnings of even convicted criminals (Malone v Metropolitan Police Comr [1980] QB 49) and, if there was any such power, the field is now fully occupied by statutory provisions which proceed on the basis that there is no such general power and make express and defined provision for a qualified grant of such a power (cf Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508). The Crown accepted that it could not realistically say that it would ever be in a position to invoke the statutory powers. The injunction was an interim one and unless it is in support of some sustainable further remedy it was wrong in principle and must be set aside.

The private law claim: restitutionary damages

It is with some hesitation that I enter upon this field at all in view of your Lordships' so far unanimous opinion save so as to record my dissent. The subject is a profound one which has attracted much attention among the academic writers for some time. Neither the subject nor the opinions of my noble and learned friends, Lord Nicholls and Lord Steyn, could be done justice in many fewer pages than their opinions will occupy. However I do not believe that it is helpful (or courteous to Mr Clayton) that I should add nothing at all. Exceptional though this case is, courts hereafter will have to consider its relevance to the decisions of other cases which will surely come before them. I will however confine myself to what I regard as the minimum of explanatory comment (with the inevitable consequence of some simplification).

The concepts of restitution and compensation are not the same though they will on occasions fulfil the same need. Restitution is analogous to property: it concerns wealth or advantage which ought to be returned or transferred by the defendant to the plaintiff. It is a form of specific implement. Its clearest form is an order for the return or transfer of property which belongs in law or in equity to the plaintiff. Property includes an interest in property. Then there are rights recognised in equity such as those which arise from a fiduciary relationship. These rights give rise torestitutionary remedies including the remedy of account which, depending on the circumstances, could also derive from a common law relationship such as agency. Then, again, there are the rights now grouped under the heading of the law of restitution or unjust enrichment. These are still truly restitutionary concepts leading to restitutionary remedies. Typically they require the payment of money by the person unjustly enriched to the person at whose expense that enrichment has taken place. In so far as the appropriate remedy is the payment of money or the delivery up of a chattel or goods is concerned the common law could provide it; insofar as it required some other remedy or the recognition of an equitable right, the chancery jurisdiction had to be invoked.

The essential of such rights and their enforcement was the procuring by the courts of the performance by the defendant of his obligations. The plaintiff recovers what he is actually entitled to not some monetary substitute for it. If what the plaintiff is entitled to is wealth expressed in monetary terms, the order will be for the payment of money but this does not alter the character of the remedy or of the right being recognised. He gets the money because it was his property or he was in some other way entitled to it. It is still the enforced performance of an obligation. The same is the case where an injunction is granted or a decree of specific performance or the ordering of an account.

It is this class of rights which the Crown is unable to invoke as a result of the judgment of Sir Richard Scott V-C upheld by the Court of Appeal. There is no obligation of Blake left to perform or which now can be enforced. That time passed with the failure to apply for an injunction in 1989 or 1990. The Crown has no right to an injunction to stop the payment of the royalty to Blake and procure its payment to the Crown instead. The Crown has no right to the royalty and does not now assert one.

The law, including equity, provides extensive and effective remedies for protecting and enforcing property rights. It is no criticism of the law that they are not available now to the Crown. The Crown does not have the substantive rights to support such remedies.

Two further points need to be briefly mentioned. There are cases which are treated as so closely analogous to proprietary rights that they are covered by remedies which are appropriate to such rights. The contractual right in Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd [1912] AC 555 was held to have created a trust. In Reading v Attorney General [1951] AC 507, restitutionary remedies were awarded against an army sergeant who used his army uniform and army vehicle to enable him to assist smugglers. The money he was paid by the smugglers was held to be money for which he must account to his employer in the same way as if he had received a bribe: see per Asquith LJ in the Court of Appeal. These cases would have assisted the Crown had they succeeded on the facts before Sir Richard Scott V-C. The other point is that where a court declines to grant an injunction it may award damages in lieu. This does not alter the principles which are applicable nor does it provide the Crown with a remedy in the present case; but it is relevant to the understanding of the authorities.

The Crown has to allege a breach of contract. This is not a claim to the performance of any obligation save in the sense used by Lord Diplock that contractual obligations are correctly understood as being the obligation to perform or pay damages for failing to do so-the primary and secondaryobligation: Photo Production Ltd v Securicor Transport Ltd [1980] AC 827. The claim is for damages in order to put the plaintiff in the same position as if the contract had been performed. It is a substitute for performance. That is why it is necessarily compensatory. The error is to describe compensation as relating to a loss as if there has to be some identified physical or monetary loss to the plaintiff. In the vast majority of cases this error does not matter because the plaintiff's claim can be so described without distortion. But in a minority of cases the error does matter and cases of the breach of negative promises typically illustrate this category.

But, before coming to them, I would like to refer to Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344. This was the case of the swimming pool. The defendant had contracted to build for the plaintiff a swimming pool of a specified depth. The pool was not of that depth. The defendant had broken his contract. The plaintiff was entitled to damages. The value of his property was affected either not at all or only marginally. The swimming pool was serviceable. But the plaintiff was entitled to a deeper pool. The prima facie measure of damages would have been the cost of increasing the depth of the pool to the stipulated depth-a considerable sum. But this sum was so disproportionate that the courts refused to award it. It would be unreasonable for the plaintiff to incur that expense. His damages must be assessed at a lower figure. The speech of Lord Mustill, at pp 359-361, is illuminating. The loss is a reasonable valuation of what the plaintiff ought to have had but did not get. It is not just the amount (if any) by which his property has a lower market value than that it would have had if the contract had been performed. In the present case, by 1989, Blake's undertaking had no remaining value to the Crown.

The question of negative covenants typically arise in relation to land and covenants not to build. A complication is that they usually involve a proprietary right of the plaintiff which he is prima facie entitled to enforce as such. Where the plaintiff has failed to obtain or failed to apply for an injunction, he has to be content with a remedy in damages. What has happened in such cases is that there has either actually or in effect been a compulsory purchase of the plaintiff's right of refusal. (The award of damages in tort for the conversion or detinue of goods is also an example of compulsory purchase as is demonstrated by the common law rule that the payment of the damages vests the title in the goods in the defendant.) What the plaintiff has lost is the sum which he could have exacted from the defendant as the price of his consent to the development. This is an example of compensatory damages. They are damages for breach. They do not involve any concept of restitution and so to describe them is an error. The error comes about because of the assumption that the only loss which the plaintiff can have suffered is a reduction in the value of the dominant tenement. It is for this reason that I agree with my noble and learned friend, Lord Nicholls, that the decision in Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798 is to be preferred to that in Surrey County Council v Bredero Homes Ltd [1993] 1 WLR 1361: see also Jaggard v Sawyer [1995] 1 WLR 269. I would however add that the order proposed by your Lordships does not reflect this principle; it goes further. It does not award to the Crown damages for breach of contract assessed by reference to what would be the reasonable price to pay for permission to publish. It awards the Crown damages which equal the whole amount owed byJonathan Cape to Blake. That is a remedy based on proprietary principles when the necessary proprietary rights are absent.

The principle of compensation is both intellectually sound as the remedy for breach and provides the just answer. The examples discussed in my noble and learned friend's speech do not on the correct analysis disclose the supposed need to extend the boundaries of remedies for breach of contract. The reason why the Crown should not recover damages in the present case derives from the exceptional public law nature of the undertaking which Blake gave. If the relationship had been a commercial one it is probable that by 1989 the undertaking would be regarded as spent or no longer enforcible, but if still enforcible the breach of it would have supported compensatory damages on the "compulsory purchase" basis.

The examples given by my noble and learned friend are examples of compensatory damages. Lord Halsbury's dining-room chair is no different unless the error which I have identified is made. He would have lost the use of the chair and it, like other such amenity-value assets, can be assessed by reference to the sum which has been expended on its acquisition and/or maintenance or interest upon its capital value during the period of deprivation. The supposed problem arises from asking the wrong question not from receiving the wrong answer.

I must also sound a further note of warning that if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive. I do not believe that such is the intention of your Lordships but if others are tempted to try to extend the decision of the present exceptional case to commercial situations so as to introduce restitutionary rights beyond those presently recognised by the law of restitution, such a step will require very careful consideration before it is acceded to.

My Lords, Mr Clayton was right to say that the exceptional facts of this case have been critical to its decision. The policy which is being enforced is that which requires Blake to be punished by depriving him of any benefit from anything connected with his past deplorable criminal conduct. Your Lordships consider that this policy can be given effect to without a departure from principle. I must venture to disagree. I would allow the appeal and dismiss the cross-appeal.

DISPOSITION:
Appeal dismissed with costs.

Declaration that Attorney General entitled to be paid by defendant sum equal to whatever amount was due and owing to defendant from publisher under publishing agreement of May 1989.